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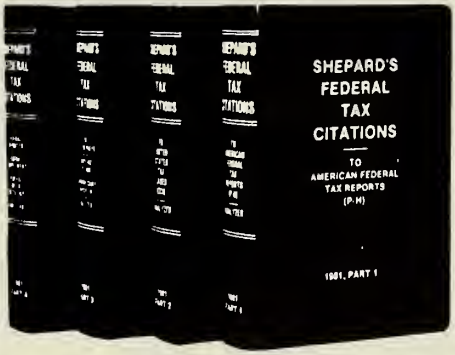

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PREHIRE AGREEMENTS IN THE CONSTRUCTION INDUSTRY: VOID OR ENFORCEABLE LABOR/MANAGEMENT OBLIGATIONS?

*Norman A. Mott, III**
*Christopher P. Charlton***

Employment practices and labor relations policies in the construction industry have changed dramatically in the last 20 years.[1] The union hiring hall is no longer the dominant source of job opportunities. Many long-time union members seek more stable employment found in nonunion construction. High costs, inefficient work practices, strikes, union violence, and jurisdictional disputes between unions, as well as corruption and declining skill levels[2] have contributed to shrinking the amount of union construction projects.[3] These changes compel reevaluation

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[1] *Compare* Covington, *Jurisdiction of the National Labor Relations Board over the Building and Construction Industry*, 28 N.C.L. REV. 1, 35 (1949) (early questions about NLRB jurisdiction) *with* M. STOKES, LABOR LAW IN CONTRACTORS' LANGUAGE 12-16 (1980) (increase in open shop construction) *and* Bornstein, *In Search of a Coherent Labor Policy for the Construction Industry*, 32 LAB. J. 588, 589-97 (1981) (development of construction labor relations) *and* Burck, *A Time of Reckoning for the Building Unions*, FORTUNE, June 4, 1979, at 82-84 (nonunion construction now dominates industry) *and* Field, *Hard Hats Soften Up*, FORBES, March 15, 1982, at 110 (building trades make wage concessions). *See generally* Address by Bernard F. Ashe, Southwestern Legal Foundation 29th Annual Institute on Labor Law (Oct. 21, 1982), *reprinted in* 206 Daily Labor Report (BNA) D-1 (Oct. 25, 1982) (labor-management relations entering new era).

[2] *See* Burck, *supra* note 1, at 82-84; Fritz, *Union Corruption Worse Than Ever*, U.S. NEWS & WORLD REPORT, Sept. 8, 1980, at 33 (racketeers rule major unions); Times-Picayune/States-Item, Sept. 15, 1982, § 1, at 4, col. 5 (union boss jailed); *Id.*, March 13, 1981, § 1, at 6, col. 1 (Justice Department links mafia with unions); *id.*, Feb. 4, 1981, § 1, at 3, col. 1 (union violence disrupts ground-breaking ceremony for Datsun); Clarion-Ledger, Jan. 26, 1981, at 11A, col. 1 (investigation of union corruption).

[3] *See* Burck, *supra* note 1, at 83. Professor Bornstein suggests the problems are of

of our national labor policy and the laws that implement it.

The statutes forming the framework for labor relations today were promulgated in a different era. The Wagner Act[4] was passed in 1934, the Taft-Hartley Amendments in 1947,[5] and the Labor Management Reporting and Disclosure Act in 1959.[6] The factual backdrop against which these Acts were passed has changed so dramatically that courts focusing upon policy considerations to justify their interpretations of the labor laws must take stock of construction industry practices as they exist today, rather than assuming those practices discussed in congressional debates continue to dominate the industry.[7]

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such a magnitude that they may be corrected only by a new national labor policy directed specifically toward the construction industry. Bornstein, *supra* note 1, at 589. That approach appears to be an overreaction to recent NLRB and court decisions.

[4] Pub. L. No. 198, ch. 372, § 118, 49 Stat. 449, 449-57 (1935) (codified at 29 U.S.C. §§ 151-168 (1976)).

[5] Pub. L. No. 101, ch. 120, 61 Stat. 136, 136-62 (1947) (codified in scattered sections of 29 U.S.C. (1976)).

[6] Pub. L. No. 86-257, 73 Stat. 519 519-46 (1959) (codified in scattered sections of 29 U.S.C. (1976)).

[7] Recent analysis of prehire agreements in legal periodicals fails to take cognizance of changing industry practices, or relate these changes to our national labor policy. Policy considerations relied upon in those commentaries are predominately drawn from congressional debates that lead to the enactment of the Taft-Hartley Act in 1947, Pub. L. No. 101, ch. 120, 61 Stat. 136, 136-62 (codified in scattered sections of 29 U.S.C. (1976)), or the Landrum-Griffin Act in 1959, Pub. L. No. 86-257, 73 Stat. 519, 519-46 (codified in scattered sections of 29 U.S.C. (1976)). *See, e.g.*, Note, *Prehire Agreement and Section 8(f) of the NLRA: Striking a Proper Balance Between Employee Freedom of Choice and Construction Industry Stability*, 50 FORDHAM L. REV. 1014, 1018, 1029-32 (1982) (congressional intent of 8(f)) [hereinafter cited as Note, *Striking a Proper Balance*]; Comment, *The Availability of Contract Remedies for Breach of Prehire Agreements*, 50 U. CIN. L. REV. 581, 584, 591 & n. 67 (1981) (reliance upon legislative history) [hereinafter cited as Comment, *Contract Remedies*]; Comment, *An Examination of Section 8(f) of the National Labor Relations Act*, 24 VILL. L. REV. 931, 933 (1978-1979) (same) [hereinafter cited as Comment, *Examination of Section 8(f)*].

A particularly naive discussion dismissing changes in the industry appears in Note, *Prehire Agreements in the Construction Industry: Empty Promises or Enforceable Rights?*, 81 COLUM. L. REV. 1702, 1703 n.17, 1716-19 (1981) [hereinafter cited as Note, *Empty Promises*]. There the writer, after citing a 20-year-old commentary and legislative history stated, "[N]othing in the interim has suggested that employer hiring practices have changed markedly." *Id.* at 1703 n.17.

While the underlying principles of a national labor policy—(1) collective bargaining by a democratically selected representative of a majority of affected workers; (2) equalization of employer and employee bargaining strengths; (3) industrial peace through labor stability; and (4) economic productivity through harmonious labor/management rela-

This article focuses upon the basic type of collective bargaining agreement used in the construction industry—the prehire agreement.[8] Section 8(f) of the National Labor Relations Act (NLRA or Act) is the limited contruction industry exception that allows employers and unions to enter into prehire collective bargaining agreements without employees first expressing majority support for the unions as their bargaining representative. Essentially, section 8(f) provides that it will not be an unfair labor practice for an employer, engaged primarily in the building and construction industry, to enter into a collective bargaining agreement with a union that does not yet represent a majority of the employer's employees in a unit appropriate for bargaining.[9]

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tions—remain constant, construction industry practices have so dramatically changed that factual assertions made in the debates cannot be assumed correct in today's construction industry. *See supra* notes 1-3 and accompanying text. These student commentators did not have the benefit of the recent appeals court decisions affirming majority selection of bargaining representatives, *see infra* note 74 and accompanying text, nor the practical experience to understand, as the courts did, the need to safeguard employee rights in the changing construction industry.

[8] The term "prehire" is unique to the construction industry. It refers to a collective bargaining agreement formed prior to an employer hiring all employees needed to work on projects covered by the agreement and prior to a majority of the eventual work force selecting a union to represent them. *See, e.g.*, R.J. Smith Constr. Co., 191 N.L.R.B. 693, 693-95 (1971) (prehire agreement).

[9] 29 U.S.C. §158(f) (1976) provides:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any

Without the statutory mandate of section 8(f), prehire agreements would be unlawful.[10] Herein we analyze the development of prehire jurisprudence against the backdrop of national labor policy and emerging industry practices.[11] Further, we analyze the developing conflict in the circuits over enforceability of prehire agreements by minority unions, a conflict that may be resolved during the Supreme Court's 1982 Term.[12] Finally, we compare the arguments supporting enforceability with the arguments supporting nonenforceability and conclude by suggesting a resolution of this dispute consistent with national labor policies and current industry practices.[13]

I. Majority Status and the Right to Represent Employees

Section 7 of the Act guarantees employees the right "to bargain collectively through representatives of their own choosing"[14] or "to refrain from such activity."[15] Section 9(a) confers exclusive status upon an employee-chosen representative who acts on behalf of *all* the employees in an appropriate bargaining unit. Because the Act confers exclusive status to a bargaining agent, it also safeguards employees' rights by requiring the agent or representative union to be "designated or selected for the purposes of bargaining by the *majority*[16] of the employees" in an appropriate unit.[17] Prevailing policy considerations[18] and ad-

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agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[10] *See infra* text accompanying notes 23-26.

[11] *See infra* notes 20-72 and accompanying text.

[12] *See infra* notes 146-201 and accompanying text.

[13] *See infra* notes 202-93 and accompanying text.

[14] 29 U.S.C. § 157 (1976); *see, e.g.*, International Ass'n of Machinists, Lodge 35 v. NLRB, 311 U.S. 72, 81 (1940) (labor organization failed to represent uncoerced majority of employees).

[15] 29 U.S.C. § 157 (1976); *see, e.g.*, ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 737 (1961) ("[t]here could be no clearer abridgement" of the right to bargain collectively or refrain therefrom than the imposition of a minority union).

[16] 29 U.S.C. § 159(a) (1976). As the Supreme Court stated in Brooks v. NLRB, 348 U.S. 96, 103 (1954), "[The Act placed] a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers." *Id.; see* Pick-Mt. Laurel Corp. v. NLRB, 625 F.2d 476, 482 (3d Cir. 1980) (improper grant of bargaining status to agent not selected by employees).

[17] 29 U.S.C. § 159(b) provides the NLRB shall select the craft, plant, or employer

ministrative and judicial constructions of the Act firmly establish this majoritarian principle.[19]

A union may establish its majority status and, thereby, its right to represent employees in an appropriate unit in one of three ways. An employer may voluntarily recognize a union as the representative of its employees if, in fact, the union is the majority representative.[20] The union may also be certified as the collective bargaining agent of employees provided it wins an election conducted by the National Labor Relations Board.[21] Fi-

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unit, or subdivision thereof, that affords employees the fullest freedom in exercising the rights guaranteed under the Act. The NLRB has decided this statutory mandate requires it to determine whether the requested unit is "appropriate" for purposes of collective bargaining. The "appropriate unit," therefore, constitutes the employee pool in which issues of majority support are measured. For an analysis of factors affecting unit determination in the construction industry see Peter Kiewit Sons' Co., 231 N.L.R.B. 76, 77-78 (1977), *enforced sub nom.*, Local 627, Int'l Union of Operating Eng'rs v. NLRB, 595 F.2d 844, 851 (D.C. Cir. 1979). *Kiewit* and its progeny focus upon whether employees of "double breasted" construction companies constitute a single appropriate bargaining unit. *See, e.g.*, NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 384-87 (9th Cir. 1979) (employees of two corporate entities constitute single appropriate bargaining unit); Land Equip., Inc., 248 N.L.R.B. 685, 690-91 (1980) (same); Edward J. White, Inc., 237 N.L.R.B. 1020, 1026 (1978) (same); *see also* Frank Naccarato, Inc., 233 N.L.R.B. 1394, 1402 (1977) (employees of three corporate entities constitute single appropriate bargaining unit). For an excellent discussion of NLRB appropriate bargaining unit principles, see generally J. ABODEELY, R. HAMMER & A. SANDLER, THE NLRB AND THE APPROPRIATE BARGAINING UNIT 251-64 (rev. ed. 1981).

[18] *See* NLRB v. Local 103, Int'l Ass'n of Bridge Workers (Higdon), 434 U.S. 335, 344 (1978) (Board's position rooted in prevailing statutory policy of majority rule); United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1066 (6th Cir. 1980) ("A basic purpose of the Act is to protect the selection of Union bargaining representatives by a majority of the employees in a free and uncoerced manner."); Schmerler Ford, Inc. v. NLRB, 424 F.2d 1335, 1339 (7th Cir.) ("The Act establishes a strong public policy favoring free choice of a bargaining agent by employees which should not lightly be frustrated."), *cert. denied*, 400 U.S. 823 (1970).

[19] *See, e.g.*, NLRB v. Local 103, Int'l Ass'n of Bridge Workers (*Higdon*), 434 U.S. 335, 344 (1978) (union representing less than majority cannot lawfully act as collective bargaining agent); Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61-65 (1975) (same); ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 738-39 (1961) (good faith is no defense to bargaining where majority status does not exist).

[20] *See, e.g.*, ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 738-39 (1961) (union must actually represent majority of employees in voluntary recognition cases); *cf.* Dow Chem. Co., Tex. Div. v. NLRB, 660 F.2d 637, 657 (5th Cir. 1981) (employer with good faith doubt of union majority status must refrain from bargaining).

[21] 29 U.S.C. § 159(c) (1976); *see, e.g.*, NLRB v. Sumter Plywood Corp., 535 F.2d 917, 919 (5th Cir. 1976) (union winning representation election is certified by NLRB as col-

nally, an employer may be required to bargain with a union when the employer has committed an unfair labor practice rendering impossible the employees' free exercise of their right to choose a bargaining representative through the Board's election process.[22] A "clear abridgment" of the employees' section 7 rights occurs when a union and an employer act to confer exclusive bargaining status upon the union while it does not enjoy majority support. Any conduct impressing a bargaining agent upon the nonconsenting majority is unlawful.[23]

The execution of a collective bargaining agreement with a minority union constitutes an unfair labor practice by both employer[24] and union.[25] Without the exception provided in section

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lective bargaining representative for all employees in appropriate unit), *cert. denied*, 429 U.S. 1092 (1977).

[22] *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 610 (1969) (board has power to order bargaining even where union did not win representation election); NLRB v. Dadco Fashions, Inc., 632 F.2d 493, 497 (5th Cir. 1980) (same); NLRB v. Crockett-Bradley, Inc., 523 F.2d 449, 451 (5th Cir. 1975) (same). Although the Supreme Court in *Gissel* indicated bargaining orders may issue in circumstances where a union's card showing does not establish majority support, the Board only recently has issued bargaining orders in favor of a union unable to show majority support among employees. Conair Corp., 261 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1161 (1982); United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. No. 129, 107 L.R.R.M. (BNA) 1577, 1580 (1981). A showing of a preelection card majority has been traditionally required to justify the issuance of a bargaining order. *See* NLRB v. Roney Plaza Apts., 597 F.2d 1046, 1051-54 (5th Cir. 1979) (valid card majority required); Bandag, Inc. v. NLRB, 583 F.2d 765, 770-73 (5th Cir. 1978) (same); NLRB v. Matouk Ind., Inc., 582 F.2d 125, 129 (1st Cir. 1978) (same). The First Circuit strongly suggests that vesting a union with bargaining authority by authorization cards presents the potential for thwarting employee rights. Accordingly, the process should be used only when no better way of ascertaining an untainted choice is available. NLRB v. Cott Corp., 578 F.2d 892, 894-95 (1st Cir. 1978) (rerun elections are the preferred method of determining employee choice of bargaining representative).

[23] *See, e.g.*, ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 738 (1961) (recognition of minority union constitutes unlawful support); Komatz Constr., Inc. v. NLRB, 458 F.2d 317, 322 (8th Cir. 1972) (same).

[24] ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 738 (1961). The Supreme Court in *Bernhard-Altmann* recognized even partial enforcement of a collective bargaining agreement defective in its inception thwarts employees' section 7 rights. The minority union had urged application of the contract to its members only. The court held:

> [T]he insistence that we hold the agreement valid and enforceable as to those employees who consented to it must be rejected. On the facts shown, the agreement must fail in its entirety. It was obtained under the erroneous claim of majority representation. . . . [T]he unlawful genesis of [the] agreement precludes its partial validity.

8(f), contracts arising out of such minority union situations are unlawful and unenforceable.[26]

II. Creation of Obligations Under Prehire Agreements

Early on both employers and unions in the building and construction industry formed "pyramiding organizations" responsible for labor relations. The building trades unions organized district councils and state-wide organizations, which paralleled employer associations.[27] The typical prehire agreement involves a regional employer association, like the Associated General Contractors (AGC), which will negotiate with craft unions on behalf of AGC member-employers.[28] The prehire agreements negotiated cover projects in a particular geographical area that usually coincide with the area jurisdiction of the craft union[29] and cover all construction projects undertaken by the

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Id at 737; *accord* Rayner v. NLRB, 665 F.2d 970, 975 (9th Cir. 1982) (binding agreement when union had majority status within relevant employee unit and relevant time); Pacific Erectors, 256 N.L.R.B. 421, 424 (1981) (rights and duties of employees and their union cannot be separated); Sprain Brook Manor, 219 N.L.R.B. 809, 809-11 (1975) (employer's defense of cardcheck prior to bargaining with union refuted by employee testimony), *enforced*, 532 F.2d 877, 878 (2d Cir. 1976). But compare Local 1424, Int'l Ass'n of Machinists v. NLRB, 362 U.S. 411, 417-19 (1960), which held the maintenance of a union security clause, made unlawful because the union did not represent a majority of the company's employees, did not constitute an unfair labor practice. To reach this result the court raised the § 10(b) limitations period, 29 U.S.C. § 160(b) (1976), to insulate an otherwise lawful union security clause from its illegal inception—an unenforceable contract with a minority union. 362 U.S. at 427-29.

[25] *See, e.g.*, ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 738 & n.10 (1961) (employers and unions subject to same restrictions regarding employee rights); NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 266-67 (1938) (company unions violate right to organize).

[26] *See, e.g.*, ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 737 (1961) (agreement void in its entirety); Chicago Freight Car & Parts Co., 83 N.L.R.B. 1163, 1165 (1949) (invalid minority agreement).

[27] *See* Covington, *supra* note 1, at 17. The NLRB has recognized that within most markets only one union competes for representation rights in a particular craft. *See* Carpenters Local 15, 240 N.L.R.B. 255, 261 (1979) (single union for each craft in construction industry).

[28] *See, e.g.*, Note, *Empty Promises*, *supra* note 7, at 1705. *See generally* Irving NLRB Guidelines on Construction Pre-hire Agreements, 1979 Lab. Rel. Y.B. (BNA) 349, 355-58 (discussing section 8(f) relationships).

[29] *See* 105 Cong. Rec. 15,541 (1959) (prehire contracts applicable to specified geographical area), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act, 1959, at 1578 (1959).

AGC member employers.[30] The scope of these agreements may be as far-reaching as a nationwide agreement or may be confined to a single city.

The agreements almost always contemplate hiring hall referrals and, except in right-to-work states, contain union security clauses requiring all employees working on covered projects to join the appropriate craft union.[31] These agreements have been refined through a substantial history of collective bargaining and focus upon the needs of employer association members and craft unions. The area pattern for unionized projects in the covered geographical region is set by these agreements.[32]

Employers who do not sign the area agreement are often left with a take it or leave it situation. In order to work a union job, or any job with union employees, the employer must sign the standard area agreement, or a project agreement incorporating the area agreement, or "don't work."[33] The voluntariness of the employer's choice varies depending upon the circumstances of each case.[34] The process of collective bargaining itself involves little free choice by employers. Small contractors, in particular, must either accept the terms of the area agreement or try to work the job nonunion. In 1980 small contractors constituted

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[30] *See* Master Agreement and Craft Agreements Between Associated General Contractors of Mississippi, Inc., and the Central Mississippi Building and Construction Trades Council (1981).

[31] The term "union security" has several meanings. As used herein it refers to contract clauses between employers and unions that require union membership as a condition of employment. *See* T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS 3-5 (1977) (discussion of the term "union security"). Union security clauses are unlawful in right to work states. *See, e.g.*, MISS. CONST. art. 7, § 198-A (1960) (right to work shall not be denied because of membership or nonmembership in a union); LA. REV. STAT. ANN. §§ 23-981 to -987 (West Supp. 1982) (same); MISS. CODE ANN. § 71-1-47 (1972) (same); TEX. REV. CIV. STAT. arts. 515, 5154g, 5207a (Vernon 1971) (same).

[32] 105 CONG. REC. 15,541 (1959), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 1577-78 (1959).

[33] *See, e.g.*, Donald Schriver, Inc. v. NLRB, 635 F.2d 859, 864 (D.C. Cir. 1980) (union insisted, under threat of picketing, that employer sign its standard agreement).

[34] *See, e.g.*, Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 3 (D.C. Cir. 1982) (employer told by union representative that to complete present job employer must sign union contract and employees must join union); Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 807-08 (5th Cir. 1981) (picketing of nonunion project resulted in employer signing a prehire agreement).

98% of the 439,381 "construction entities with payrolls."[35] Working nonunion is impossible in many heavily unionized areas.[36] Nonunion subcontractors face substantial threshold burdens in obtaining bids from unionized general contractors who fear disruption at the job site, aimed at the nonunion subcontractors, will interfere with the orderly work of union workers.[37]

III. Traditional Labor Law Principles Are Inappropriate in the Construction Context

From the passage of the Wagner Act in 1934 until the passage of the Taft-Hartley Amendments in 1947, the National Labor Relations Board declined to exercise jurisdiction over the building and construction industry.[38] After the advent of Taft-Hartley the Board began to apply NLRA principles, developed in the manufacturing context, to the construction industry.[39] The application proved impractical, if not impossible,[40] because

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[35] *See* Bornstein, *supra* note 1, at 588.

[36] *See, e.g.*, Scott v. Moore, 680 F.2d 979, 988 (5th Cir. 1982) (en banc) (union engaged in mob violence, physical assaults, beatings, and destruction of property, in furtherance of a conspiracy in violation of 42 U.S.C. § 1985(3), to prevent nonunion construction companies and nonunion employees from working in "heavily unionized" geographical area), *cert. granted*, 51 U.S.L.W. 3404 (U.S. Nov. 30, 1982) (No. 82-486).

[37] *See, e.g.*, Todd v. Jim McNeff, Inc., 667 F.2d 800, 801 (9th Cir.), *cert. granted*, 102 S. Ct. 3508 (1982). The employer argued the coercion present relieved the obligation to perform under its prehire agreement with the minority union. The Ninth Circuit rejected that argument. 667 F.2d at 804. The Supreme Court granted certiorari in the case on the issues of retrospective enforceability and coercion. 102 S. Ct. 3508 (1982). *See infra* note 81 and accompanying text.

[38] *See, e.g.*, Johns-Manville Corp., 61 N.L.R.B. 1, 2 (1945) (no jurisdiction over building and construction industry); Brown & Root, Inc., 51 N.L.R.B. 820, 820-21 (1943) (assertion of jurisdiction would not effectuate Wagner Act). *But see* The Austin Co., 70 N.L.R.B. 851, 851-52 (jurisdiction over construction company), *enforced*, 165 F.2d 592, 594 (7th Cir. 1947); Isbell Constr. Co., 27 N.L.R.B. 472, 485-87 (1940) (exercised jurisdiction). S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act, 1959, at 423 (1959) [hereinafter cited as 1959 S. Rep.]. For a discussion of the Wagner Act Era and the evolution of the Board's assumption of jurisdiction, see Covington, *supra* note 1, at 115; Note, *Empty Promises*, *supra* note 7, at 1702-04; Comment, *Striking a Proper Balance*, *supra* note 7, at 1014-20.

[39] *See* Plumbing Contractors Ass'n, 93 N.L.R.B. 1081, 1084 n.12 (1951) (citing cases).

[40] *See* 1959 S. Rep., *supra* note 38, at 55-56 (amendments to Labor Management Relations Act of 1947), *reprinted in* 1 NLRB, Legislative History of the Labor Man-

of the brief duration of construction projects and the fact that the individual construction employee normally worked for many employers, although for none of them continuously.[41] Indeed, the NLRB's procedures were ill-suited to resolving questions concerning representation in the construction industry.[42]

AGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 451-52 (1959); H.R. REP. No. 741, 86th Cong., 1st Sess. 1920 (1959) (characteristics of construction industry), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 777-78 (1959) [hereinafter cited as 1959 H.R. REP.]; 105 CONG. REC. 15,541-42 (1959) (prehire contracts), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 1577-78 (1959); NLRB v. Haberman Constr. Co., 641 F.2d 351, 364 & n.14 (5th Cir. 1981) (en banc) (same). Before enforcing a collective bargaining agreement the NLRB required a representative compliment of employees be hired and the union represent a majority of those so hired. *Cf.* Finix & Scisson, Inc., 207 N.L.R.B. 752, 759 (1972) (union must have majority support to gain recognition); Scottex Corp., 200 N.L.R.B. 446, 451 (1972) (same). At one point, prior to passage of § 8(f), General Counsel refused to issue unfair labor practice complaints against employers or unions that entered into prehire agreements. S. REP. No. 1509, 82d Cong., 2d Sess. 5-6 (1952).

[41] *See, e.g.*, Daniel Constr. Co., 133 N.L.R.B. 264, 267 (1961) (workers employed irregularly eligible to vote), *enforced*, 341 F.2d 805, 808 n.3 (4th Cir. 1965). Commentators have identified a number of fundamental differences in employment present in the construction industry but not in manufacturing. They include: (1) fluctuating employment whereby a worker will work for a number of employers at a number of work sites on a project-by-project basis; (2) self supervision or supervision by union members; (3) unstable and erratic employment opportunity; (4) skills acquired through union apprenticeship programs; (5) a high percentage of employees in the industry possess specialized skills within a clearly defined craft; (6) identification with craft or job skill rather than employer; and (7) work performed alongside craftsmen working for other employers. Bornstein, *supra* note 1, at 589; *see* Covington, *supra* note 1, at 1-3; Note, *Empty Promises*, *supra* note 7, at 1702-04. These factors once dominated construction industry employment.

With the emerging dominance of nonunion construction, however, employment opportunities have become more stable. Workers tend to identify with their employer, work more regularly for a single employer, and work under supervision provided by the employer rather than a union hiring hall. Skills may be acquired through employer or employer-association sponsored training programs, in addition to the on-the-job training or union apprenticeship programs. The scope of job duties or assignments are determined by ability and merit rather than craft or jurisdictional distinctions. As these factors become more prevalent the nature of construction industry employment will stablize to an extent, but it is unlikely the terms and conditions of employment will parallel the stability present in manufacturing.

[42] *See* 1959 S. REP., *supra* note 38, at 55 (representation elections not feasible given the short duration of construction projects), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 451-52 (1959); 105 CONG. REC. 15,541-42 (1959)(purpose to make lawful industry practice), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE

During the Wagner Act period it had become customary for construction employers to enter into collective bargaining agreements for fixed durations (normally from one to three years) rather than for the duration of specific projects. These agreements necessarily applied to projects that had not yet been started or even contemplated.[43] Under these agreements employers effectively recognized a given union as the collective bargaining agent of employees without proof that a majority of employees voluntarily sought union representation.[44] Because the NLRB refused to assert jurisdiction over the construction industry,[45] the contracting parties were not constrained by Board jurisdiction over their unfair labor practices.[46]

Serious problems developed when, after passage of the Taft-Hartley Act, the NLRB began to apply traditional labor law principles to the construction industry. Employees' free choice and majority rule, as protected by the NLRB's elections process, could not be reconciled with the existing special needs of the construction industry.[47] Ultimately Congress attempted to resolve this conflict by enacting section 8(f) of the NLRA.[48]

ACT, 1959, at 1577-78 (1959); *cf.* NLRB v. Haberman Constr. Co., 641 F.2d 351, 364 (5th Cir. 1981) (en banc) ("short duration and occasional nature of employment . . . make collective bargaining negotiations—which must await the employees' choice of a bargaining representative—difficult at best").

[43] 1959 S. REP., *supra* note 38, at 28, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 424 (1959).

[44] *See supra* note 43; 105 CONG. REC. 8, 360 app. (remarks of Senator Goldwater) (prehire section makes lawful otherwise illegal construction industry practices), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959 at 1830 (1959); *cf.* NLRB v. Local 103, Int'l Ass'n of Bridge Workers (Higdon), 434 U.S. 335, 349 (1978) (prehire agreements convenience union and employer but in no way express employees' representational wishes).

[45] 1959 S. REP., *supra* note 38, at 27, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 423 (1959).

[46] *See, e.g.*, Plumbing Contractors Ass'n, 93 N.L.R.B. 1081, 1087 (1951) (employers not prevented from changing work assignments); Brown & Root, Inc., 51 N.L.R.B. 820, 820 (1943) (unfair labor practices complaint dismissed for lack of jurisdiction).

[47] *See* 1959 S. REP., *supra* note 38, at 55-56 (amendments to the Taft-Hartley Act), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 451-52 (1959); Local 103, Int'l Ass'n of Bridge Workers (Higdon), 434 U.S. 335, 348-49 (1978) (unique needs of construction industry); NLRB v. Haberman Constr. Co., 641 F.2d 351, 364 (5th Cir. 1981) (same).

[48] *See* 105 CONG. REC. 15,541 (1959) (prehire agreement legislation necessary), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND

Section 8(f) creates a specific exception to sections 8(a) and 8(b), which define conduct constituting unfair labor practices. It authorizes a construction industry employer to enter into a labor agreement with a labor union even though the majority status of the union has not been established prior to the making of the agreement. Section 8(f) further provides these prehire agreements shall not serve as a "contract bar" to petitions for a representation election. Once a union achieves majority status in an "appropriate unit" in a permanent and stable workforce, section 8(f) agreements arguably mature into section 9 agreements and may become subject to the normal Board rules on contract bar and majority status presumptions.[49]

The high degree of unionization created a construction workforce populated by fiercely loyal "union men" and dominated by "closed shops." Representation questions properly could be presumed resolved in favor of union majority status. Since employers, unions, and employees were of one mind concerning "working union," disputes about representation issues were rare.[50]

The participants voluntarily acquiesed in an effort at "working union" that constituted the industry norm.[51] The congressional debate that lead up to adoption of section 8(f) occurred on this factual foundation.[52] More recently, however, em-

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DISCLOSURE ACT, 1959, at 1577 (1959).

[49] *See infra* notes 106-45 and accompaning text.

[50] Commentators have articulated the various benefits derived by both union and employer parties to prehire agreements. *See, e.g.*, Note, *Empty Promises, supra* note 7, at 1704; Note, *Striking a Proper Balance, supra* note 7, at 1015; *accord* Contractors' Health & Welfare Plan v. Associated Wrecking Co., 638 F.2d 1128, 1134 (8th Cir. 1981) (prehire agreements benefit both employers and employees). Congress' primary purpose in enacting the prehire section was to legitimize existing industry practices. *See* 105 CONG. REC. 8360 app. (1959) (remarks of Senator Goldwater), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 1830 (1959).

[51] *See* Covington, *supra* note 1, at 2 (1949); Note, *Empty Promises, supra* note 4, at 1704; Note, *Striking a Proper Balance, supra* note 4, at 1014-15.

[52] Senate Report No. 187 recognized two important facts. First, it recognized the construction industry was substantially organized and accordingly "had no need for the protection afforded by the [Wagner] Act." Second, it assumed employers, upon entering into prehire agreements, would rely upon skilled union labor. That reliance would ensure that the union would represent a majority of those persons hired. 1959 S. REP., *supra* note 38, at 2728, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT

ployers and employees have questioned the benefits of union dominated construction.[53] It was in this union dominated context that section 8(f) agreements were considered cozy mechanisms for construction industry employers and unions to lock up the labor relations policy on a construction project before it became complicated by employees exercising a different choice of representation, or choosing no representation at all.[54]

Increasingly, building and construction trades work has gone to "open shops" or nonunion contractors. In 1968 as little as twenty percent of construction dollars were spent on nonunion work but, by 1979, sixty percent of the construction dollars were spent on nonunion projects.[55] With the percentage of nonunion construction increasing dramatically, questions concerning representation rights are both more frequent and more complex. Working nonunion has emerged as the dominant alternative to the closed shop. Two significant legal milestones have contributed to the demise of the craft union's grip up on construction work. The first was the NLRB's approval of "double-breasted" operations.[56] As a result of this adoption, union construction employers freely began setting up nonunion sister corporations that bid and performed work on a nonunion basis.[57] The change over to nonunion construction was largely motivated by economics. It simply became impossible for unionized companies to bid competitively on many projects. By creating a nonunion sister corporation a construction company could bid on jobs requiring union

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REPORTING AND DISCLOSURE ACT, 1959, at 423-24 (1959).

[53] *See* Burck, *supra* note 1, at 82-83.

[54] *See* Note, *Striking a Proper Balance*, *supra* note 1, at 1014-16.

[55] Burck, *supra* note 1, at 83.

[56] *See* L. & S. Constr. Co., 155 N.L.R.B. 524, 527 (1965) (single employer exists for unit purposes); Central New Mexico Chapter Nat'l Elec. Contractor's Ass'n, 152 N.L.R.B. 1604, 1608 (1965) (employees of individual employers constitute unit).

[57] *Compare* Bornstien, *The Emerging Law of the "Double Breasted" Operation in the Construction Industry*, 28 LAB. L.J. 77, 87-88 (1977) (uncertainty of the effect of double breasted shops on the construction industry) *with* Merrill, *Dual Shop Operation*, S. CAL. CONTRACTOR, April 1979 (declining union grip over construction coincides with emergence of double breasted operations) *and* Comment, *Double Breasted Operations in the Construction Industry: A Search for Concrete Guidelines*, 6 DAYTON L. REV. 45, 45 (1981) (double breasting pervades industry) [hereinafter cited as Comment, *Concrete Guidelines*].

labor while the sister corporation could bid on nonunion jobs.[58] The legal avenues for implementing the change over to nonunion status were substantially broadened when the Supreme Court rendered its decision in *NLRB v. Local 103, International Association of Bridge Workers (Higdon).*[59] In *Higdon* the employer and union had a substantial collective bargaining history with a succession of lawful prehire agreements.[60] Through an alter ego,[61] the employer entered into two projects with nonunion labor. The union picketed both projects for the admitted purpose of forcing the employer to abide by the terms of the prehire agreement, although the union had never achieved majority status at either project.[62] After thirty days of picketing the employer filed an unfair labor practice charge alleging the picketing violated section 8(b)(7) of the Act.[63]

The administrative law judge concluded the 8(f) agreement was lawful and the picketing was for the lawful objective of forcing employer compliance with the terms of the prehire agreement. The NLRB disagreed, holding, that since the union never achieved majority status, the 8(f) agreement was not binding upon the employer. The NLRB's synthesis of 8(f) law to the evidence caused it to conclude that picketing by an uncertified minority union could only be for a recognitional purpose.[64] This conduct became an unfair labor practice since the union did not file a section 9(c) petition[65] within the reasonable period (thirty days).[66]

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[58] *See* Comment, *Concrete Guidelines, supra* note 57, at 45-46 (advantages of double breasting).

[59] 434 U.S. 335, 350-52 (1978). For an early analysis of *Higdon* and its import, see Gould & Goldstein, *NLRB v. Iron Workers Local Union No. 103: A Case Analysis*, 30 LAB. L.J. 76, 77-83 (1979).

[60] 434 U.S. at 339.

[61] For a discussion of factors and case authority concerning whether two corporate entities constitute alter egos, see J.M. Tanaka Constr. v. NLRB, 675 F.2d 1029, 1033-35 (9th Cir. 1982).

[62] 434 U.S. at 339.

[63] *Id.* at 340. Section 8(b)(7) prohibits a union from engaging in recognitional picketing for more than 30 days. 29 U.S.C. § 158(b)(7); 434 U.S. at 338.

[64] Local 103, Ass'n of Bridge Workers (Higdon), 216 N.L.R.B. 45, 45-47 (1975).

[65] *Id.* at 47. As the Supreme Court noted, the union was free to seek its recognitional objective through the NLRB's election procedures, but did not. 434 U.S. at 339.

[66] The courts and the NLRB have generally allowed recognitional picketing for 30

The United States Court of Appeals for the District of Columbia set aside the NLRB's order,[67] holding that even a minority union that is party to an 8(f) agreement that was valid in its inception may picket to enforce the terms of the agreement. The minority union may also seek remedies through unfair labor practice proceedings for the employer's refusal to bargain and apply the terms of the prehire agreement.[68]

The Supreme Court reversed. Without majority status, neither the contract nor the union's "settlement" to bargain exclusively for its member-employees had "matured" into an enforceable obligation.[69] Neither good faith nor mistaken belief that the union attained majority status will countenance a frustration of employee free choice or selection of a bargaining representative by a minority of the affected employees. Under section 8(f), the Court noted a union does not receive the normal insulation from inquiry into its majority status.[70] This is consistent with the NLRB's position that prehire agreements are "preliminary" steps that contemplate the union's achievement of majority support before maturing into an enforceable obligation to bargain or honor the agreement.[71]

Once the inchoate nature of the 8(f) agreement is determined, picketing to enforce the agreement constitutes recognitional picketing. This is violative of section 8(b)(7)(c) when the union does not seek a representation election within thirty days.[72]

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days, the maximum period allowed by the statute. *See, e.g.*, Rockford Redimix Co. v. Zipp, 482 F. Supp. 489, 493-94 (N.D. Ill. 1979) (upheld recognitional picketing), *aff'd*, 632 F.2d 30, 32-33 (7th Cir. 1980), *cert. denied*, 450 U.S. 929 (1981); Local 388, Constr. Laborers, 137 N.L.R.B. 1650, 1653-54 (1962) (same).

[67] Local 103, Int'l Ass'n of Bridge Workers v. NLRB (Hidgon), 535 F.2d 87, 90 (D.C. Cir. 1976).

[68] *Id.* at 89-90. The D.C. Circuit considered prehire agreements to be enforceable by minority unions to the same extent as they would be by certified unions or unions who had achieved majority status. *Id.*

[69] 434 U.S. at 346.

[70] *Id.* at 345.

[71] *See* Dee Cee Floor Covering, 232 N.L.R.B. 421, 422 (1977) (prehire agreements do not give rise to a presumption of majority status); Ruttmann Constr. Co., 191 N.L.R.B. 701, 702 (1971) (prehire agreements merely a preliminary step); *accord* NLRB v. Irvin, 475 F.2d 1265, 1270 (3d Cir. 1973) (employer not excused from bargaining collectively).

[72] 434 U.S. at 346.

IV. The Effect of "Majority Status" on Section 8(f) Agreements

A. NLRB and Courts Agree Repudiation of a Section 8(f) Agreement Is Not an Unfair Labor Practice Unless the Union Has Achieved "Majority Status"

Before *Higdon* several courts of appeal held employers were not free unilaterally to repudiate 8(f) agreements, even though the union had not achieved majority status.[73] Since *Higdon*, however, courts have confronted a number of cases raising questions about the legal effect to be afforded prehire agreements. The courts of appeal have consistently held a construction employer does not commit an unfair labor practice by repudiating a prehire agreement when there is an absence of majority status.[74]

Section 8(a)(5)[75] of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees when a section 9 relationship exists.[76]

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[73] *See* Local No. 150, Int'l Union of Operating Eng'rs v. NLRB, 488 F.2d 1186, 1190 (D.C. Cir. 1973) (right to abrogate contract with minority union inconsistent with right to enter into contract with minority union); NLRB v. Irvin, 475 F.2d 1265, 1271 (3d Cir. 1973) (repudiation not permitted in presence of union security and checkoff clauses).

[74] Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 10 (D.C. Cir. 1982); Laborers Dist. Council v. McDowell Contractors, 680 F.2d 94, 95-96 (11th Cir. 1982); Todd v. Jim McNeff, Inc., 667 F.2d 800, 1134 (9th Cir.), *cert. granted*, 102 S. Ct. 3508 (1982); NLRB v. Haberman Constr. Co., 641 F.2d 351, 365-66 (5th Cir. 1981) (en banc); Constr. Erectors v. NLRB, 661 F.2d 801, 805 (9th Cir. 1981).

[75] 29 U.S.C. § 158(a)(5).

[76] Withdrawal of recognition from a Board certified bargaining representative is an unfair labor practice under § 8(a)(5). A lawfully filed decertification petition can justify a refusal to bargain. *See* Brooks v. NLRB, 348 U.S. 96, 104 (1954) (employer with fair doubts about union's majority may refuse to bargain). The decertification petition must be supported by an adequate "showing of interest," 30% of the employees in the appropriate unit. *See* Sahara Tahoe Corp., 648 F.2d 553, 555 (9th Cir. 1980) (more than 30% of employees in bargaining unit signed petition). The Eighth Circuit has held the filing of a decertification petition with the minimum 30% showing of support alone is sufficient to justify an employer's refusal to bargain. Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1037 (8th Cir. 1976) (citing National Cash Register Co. v. NLRB, 494 F.2d 189, 194 (8th Cir. 1974)). *But see* Dresser Indus., Inc., 264 N.L.R.B. No. 145, 111 L.R.R.M. (BNA) 1436, 1437 (1982) (decertification petition alone does not justify withdrawal of recognition). Other courts have required either greater than 50% support for a decertification petition, J. Ray McDermott & Co. v. NLRB, 571 F.2d 850, 859 (5th Cir. 1978), or the minimum 30% plus other indicia of nonsupport, *id.*; Sahara-Tahoe Corp. v. NLRB, 648 F.2d 553, 556 (9th Cir. 1980) (30% support for decertification with other

Section 9 relationships arise when a union becomes the designated representative of the majority of employees in an appropriate bargaining unit.[77] Prior to the time a union achieves majority status in an appropriate bargaining unit no section 9 relationship exists; therefore, section 8(f) agreements are not enforceable, and there is no certification or contractual obligation upon which to base a section 8(a)(5) unfair labor practice charge.[78] Thus, employers who are parties to prehire agreements do not face the barrier of section 8(a)(5) when they withdraw recognition from a minority union or make unilateral changes in the contractual working conditions.[79]

The courts have had greater difficulty determining the extent to which a minority union, or union welfare fund trustees, may enforce a section 8(f) agreement in a breach of contract action.[80] The Supreme Court has recently granted certiorari in a case that may resolve this latter issue.[81]

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indicia justifies refusal to bargain). Certain objective criteria can also justify withdrawal of recognition. *See* NLRB v. A.W. Thompson, Inc., 651 F.2d 1141, 1143 (5th Cir. 1981) (clear and convincing evidence of employer's "good faith doubt as to union's continuing majority support" required to support withdrawal of recognition from NLRB certified bargaining agent).

[77] *See supra* notes 16-19 and accompanying text.

[78] Irving, *supra* note 28, at 358, 360.

[79] *See supra* note 74 and accompanying text.

[80] Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 8 (D.C. Cir. 1982) (voidable by repudiation, but enforceable, retrospectively until repudiated); Laborers Dist. Council v. McDowell Contractors, 680 F.2d 94, 95-96 (11th Cir. 1982), (void and not enforceable); Todd v. Jim McNeff, Inc., 667 F.2d 800, 804 (9th Cir.) (voidable by repudiation, but enforceable until repudiated), *cert. granted*, 102 S. Ct. 3508 (1982); Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 812 (5th Cir. 1982) (not enforceable by union absent majority status); New Mexico Dist. Council Carpenters v. Mayhew, 664 F.2d 215, 217-18 (10th Cir. 1981) (contract enforceable totally in § 301 action, including suit for wages owed under contractual wage rate); Contractors' Health & Welfare Plan v. Associated Wrecking Co., 639 F.2d 1128, 1134 (8th Cir. 1981) (contract enforceable in its entirety in § 301 action regardless of majority status).

[81] In Todd v. Jim McNeff, Inc., 667 F.2d 800 (9th Cir.), *cert. granted*, 102 S. Ct. 3508 (1982), the Ninth Circuit considered two issues: (1) Is a prehire agreement authorized by § 8(f) enforceable in a suit brought under § 301 of the Labor Management Relations Act (29 U.S.C. § 185), absent a showing that the union signatory to the agreement is representative of the employer's employees? (2) Is a prehire agreement authorized by § 8(f) enforceable if it was entered into by an employer because of coercion by the union? 667 F.2d at 802-04. The Ninth Circuit allowed retrospective, prerepudiation enforcement. The Court also refused to allow the employer to rely upon a coercion defense. *Id.*

B. *Majority Status and the Project-By-Project Contractor*

The leading Board case addressing the issue of project-by-project contractors is *Dee Cee Floor Covering, Inc.*,[82] a 1977 decision. Dee Cee, engaged in the sale and installation of carpeting, entered into a prehire agreement in April 1973. Dee Cee did not have a regular, stable work force, but, instead, hired employees "as the need arose."[83] In April 1972 Dee Cee went out of business, and its owner formed a new corporation, Dagin Akrab, which entered into an identical contract with the same union. In August 1975 Dagin Akrab was awarded a substantial contract at a military base. Prior to hiring its workforce on the project, Dee Cee's agents told union members that work at the project would be nonunion only. Union members were told they would have to withdraw from the union if they wanted to work on the project.[84]

The NLRB found the labor agreement to be an 8(f) prehire agreement. Because no workforce existed at the time the company declared its intent to run the Fort Riley project nonunion, the employer was free to withdraw recognition from the union and make unilateral changes in the terms and conditions of employment. That conduct, the Board found, did not constitute an unfair labor practice, since the terms of the agreement were not binding upon the company until the union achieved majority status on the project.[85]

The fact that the union may have obtained majority status on previous projects was held irrelevant. The NLRB held that when a contractor hires its workforce on a project-by-project basis, the union must attain majority status on each project it

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The Supreme Court has granted certiorari on both issues. In Woelke & Romero Framing v. NLRB, 102 S. Ct. 2071, 2083 (1982), the Supreme Court specifically reserved the issue of whether a union could use economic pressure or picketing to obtain a prehire agreement.

[82] 232 N.L.R.B. 421 (1977).

[83] *Id.*

[84] *Id.* This conduct likely constituted an unfair labor practice under § 8(a)(1), but was not in issue, probably because the six-month period of prescription set out in § 10(b) had run.

[85] 232 N.L.R.B. at 421-22.

wishes to be covered by the prehire agreement.[86]

While the Board held in *Dee Cee Floor Covering* that an employer could void 8(f) agreements on a project-by-project basis, the Supreme Court has not directly decided that question because it was not involved in the *Higdon Case*.[87] The Board in *Dee Cee Floor Covering* recognized the possibility of a section 8(f) contract ripening into a section 9 obligation when a union reached majority status in an appropriate unit at an existing project. After *Higdon,* John Irving, who was serving as General Counsel of the National Labor Relations Board, issued a lengthy set of guidelines interpreting *Dee Cee Floor Covering* to apply only in *initial* section 8(f) contracts.[88] Irving took the position that 8(f) contracts ripen into section 9[89] relationships once the union achieves majority status on any project covered by the agreement.[90] Irving's view limited the application of *Dee Cee Floor Covering* to the narrow circumstances in which a union

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[86] *Id.* at 422; *accord* Giordano Constr. Co., 256 N.L.R.B. 47, 47 (1981); D'Angelo & Khan, Inc., 249 N.L.R.B., 396, 397 (1980); R.J. Smith Constr. Co., 208 N.L.R.B. 615, 615 (1974).

[87] 434 U.S. at 339.

[88] Irving, *supra* note 28, at 358. The office of General Counsel serves as the prosecutorial arm of the NLRB. Opinions and Advice Memoranda of the General Counsel are guidelines that the various regional offices of the NLRB use to determine whether to issue a complaint in an unfair labor practice proceeding. While usually controlling the regional offices decision to prosecute an unfair labor practice case, provided the set of facts discussed in the guidelines exist, do not carry the precedential weight of a NLRB decision. In fact the Board has, on occasion, rejected the position taken in advice memoranda. Mr. Irving is no longer General Counsel. Subsequent court decisions and Board decisions indicate that Irving's 1979 Guidelines may not constitute the present NLRB position.

[89] Section 9(a) provides:

> (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, that the bargaining representative has been given opportunity to be present at such adjustment.

[90] Irving, *supra* note 28, at 358, 360-62.

has never achieved majority status in an appropriate unit.[91]

Despite Irving's opinion, a recent decision of the United States Court of Appeals for the Fifth Circuit reached a dramatically different conclusion. In *NLRB v. Haberman Construction Co.*[92] a project-by-project contractor was held to be bound by the Carpenters/AGC Agreement even though he had not signed it.[93]

In the middle of an ongoing project, Haberman informed its carpenters "it would cease paying for their union benefits, and that it was going 'open shop.' "[94] Five union employees quit because of this action. The NLRB held the company committed an unfair labor practice by unilaterally refusing to obey the oral agreement to abide by the Carpenter/AGC contract.

The NLRB also ordered the employer to pay full back pay to the men who quit[95] in response to the unfair labor practice. The NLRB also suggested that pay was appropriate for work they would have performed on the existing project and on future Haberman projects. The Board further ordered the company to offer similar jobs on projects existing at the time of the order to the five union employees who had quit. The company appealed to the United States Court of Appeals for the Fifth Circuit.[96]

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[91] *Id.* at 360-61. To do otherwise, reasoned General Counsel, "would be contrary to the statutory policy of promoting industrial peace and stability." *Id.* The Board disagrees. *See, e.g.*, Giordano Constr. Co., 256 N.L.R.B. 47, 48 (1981) (union must demonstrate its majority at each new jobsite).

[92] 641 F.2d 351 (5th Cir. 1981) (en banc).

[93] *Id.* at 355-56. Parties to a collective bargaining agreement may be bound by their words and their actions even though no binding agreement is signed. *See, e.g.*, Capitol-Hustings Co. v. NLRB, 671 F.2d 237, 243 (7th Cir. 1982) (mere conduct manifests an intent to be bound); Wilkes Barre Printing Pressmen and Assistant's Union v. Great N. Press, 522 F.Supp. 106 (M.D. Pa. 1981) (same); Vin James Plastering Co., 226 N.L.R.B. 125, 131 (1976) (written contractual arrangement unnecessary to bind parties).

[94] 641 F.2d at 355. The term "open shop" is susceptible to several interpretations. It could mean union membership is not required to remain employed, or it could mean the project was to be run nonunion. *Id.* at 357; *see also* T. Haggard, *supra* note 31, at 35-94.

[95] For a general discussion regarding constructive discharge in an employment discrimination context, see NLRB v. Sure-Tan, Inc., 672 F.2d 592, 600-01 (7th Cir. 1982); Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975); J.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972).

[96] The panel opinion reported at 618 F.2d 288 (5th Cir. 1980) held that once majority status was achieved on the existing project its presumption carried over to future projects, even at different locations. The § 8(f) agreement, in essence, matured once the

The en banc court agreed that the company had committed an unfair labor practice in declaring its intention to go "open shop" during the middle of the project.[97] The prehire agreement was held enforceable because the union proved majority status on the existing project, thus establishing that the section 8(f) agreement had ripened into a section 9 obligation for purposes of the ongoing project. The contractor, therefore, was not free to repudiate the agreement. The court also agreed that the men who quit were constructively discharged[98] and were entitled to back pay. The court, however, allowed pay only for the existing project and not for future projects.[99]

In reaching this result, the Court cited *Dee Cee Floor Covering* and noted that the NLRB required a union to reestablish majority status at each of a project-by-project employer's job sites before its prehire agreement would be enforced at a subsequent site.[100] Because the union proved its majority status at Haberman's ongoing project the mid-project repudiation constituted an unfair labor practice. At the time of repudiation, however, no employees had been hired for future projects. The union, therefore, could not have achieved majority status at the future projects, and the repudiation as to those projects was lawful.[101] Since the constructively discharged employees testified and the Board found they quit because they refused to work nonunion, the court ruled this finding of fact foreclosed the back pay issue as to subsequent projects.[102]

Both the NLRB and the Fifth Circuit concluded that before a union can enforce a section 8(f) prehire contract with a pro-

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union achieved majority status at any covered project. *Id.* at 295; *accord* Irving, *supra* note 28, at 360-62. The court held that once the agreement had matured, the union's majority could only be challenged in the manner permissible in a § 9(a) relationship. 618 F.2d at 295; *see infra* note 135. Since the majority status carried over to future projects, the court reasoned that the board properly ordered a remedy for unfair labor practices on the existing projects to carry over to future projects.

[97] 641 F.2d at 357-58.

[98] *Id.* at 358.

[99] *Id.* at 368-70. The court ruled as a matter of law that back pay awards for projects, other than the one from which the men were constructively discharged, were inappropriate. *Id.* at 370.

[100] *Id.* at 365, 368.

[101] *Id.* at 368.

[102] *Id.* at 370.

ject-by-project contractor it must reestablish majority status at each new job site. If majority status is not achieved on the project, "Section 8(f) agreements are entirely voidable."[103] Thus, no presumption of majority status carries over to successive projects.[104] The determinative inquiry for the NLRB in unfair labor practice proceedings, therefore, is whether the section 8(f) agreement has been validated by the union achieving majority status at the relevant construction site. Without this showing of majority support the agreement is unenforceable.[105]

C. *Majority Status in a "Permanent and Stable" Work-force*

Outside the section 8(f) context, a section 9 relationship carries with it a presumption[106] of continued majority support for the term of the contract up to three years.[107] In the section 8(f) context, however, application of this rule proves awkward. While a section 8(f) contract may well ripen into a section 9(a) relationship on a construction project when majority support is shown, it does not follow that a binding section 9(a) relationship should automatically inhere at successive projects. The requisite majority support may or may not exist at subsequent projects, depending upon the section 7 preferences of employees hired at the subsequent projects.

Indeed, the Board took cognizance of this dilemma in *Dee Cee Floor Covering*[108] when it noted, "[T]he mere fact that the Union might indeed have represented a majority of the employ-

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[103] *Id.* at 363-68.

[104] *Id.* at 367-68.

[105] *Id.* at 365-68; *see* Hageman Underground Constr., 253 N.L.R.B. 60, 71 (1980) (repudiation of prehire agreement during its term by an employer of a permanent and stable workforce is an unlawful refusal to bargain); Precision Striping, Inc., 245 N.L.R.B. 169, 171 (1979) (majority status existed when unfair labor practice committed), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981). *See generally* R.J. Smith Constr. Co., 191 N.L.R.B. 693, 695 (1971) (no irrebutable presumption of majority status), *enforcement denied*, 480 F.2d 1186 (D.C. Cir. 1973).

[106] *See, e.g.*, Electro Metalurgical Co., 72 N.L.R.B. 1396, 1399-1400 (1947) (existing contract bar to question concerning representation). Majority status is presumed to continue for the duration of the contract, up to three years. *See* Montgomery Ward & Co., 143 N.L.R.B. 587, 588 (1963) (five-year contract was no bar).

[107] General Cable Corp., 139 N.L.R.B. 1123, 1123-25 (1962).

[108] 232 N.L.R.B. 421 (1977).

ees at Respondent Dee Cee's previous jobsites is of no consequence inasmuch as the Union must demonstrate its majority at each new job site in order to invoke the provisions of Section 8(a)(5) of the Act."[109] This language suggests binding section 9 relationships in the prehire context are coterminous with and must be reestablished through proof of majority support at each successive job site.

Subsequent Board decisions distinguish between contractors that have a "permanent and stable" work force and contractors that hire on a "project-by-project" basis. In *Hageman Underground Construction*,[110] the employer hired a "permanent and stable" workforce, which worked on a multi-site basis. The Board noted its prehire agreement required the employer to recognize and bargain with a union that had achieved majority status in that workforce.[111] Moreover, the obligation to bargain and recognize the union was held to carry over to subsequent projects; thus, the union was not required to demonstrate its majority status at each subsequent site.[112] The Board expressly limited *Dee Cee Floor Covering* to project-by-project employers with no stable workforce and with "little employee carry over from site to site."[113]

The NLRB[114] and some courts[115] embrace the fiction that a

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[109] *Id.* at 422.

[110] 253 N.L.R.B. 60 (1980).

[111] *Id.* at 60-62.

[112] *Id.* at 62-63; *see* Rayel Elec. Co., 260 N.L.R.B. No. 190 (employer bound to bargain with union under predecessor contract), *reprinted in* 109 L.R.R.M. (BNA) 1339, 1340 (1982); Corrugated Structures, Inc., 252 N.L.R.B. 523, 524 (1980) (majority status need not be shown at each job site); Land Equip., Inc., 248 N.L.R.B. 685, 689 (1980) (same); Precision Striping, Inc., 245 N.L.R.B. 169, 169-70 (1979) (irrebutable presumption of majority status), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981).

[113] 253 N.L.R.B. at 62 n.7.

[114] *See, e.g.*, Rayel Elec. Co., 260 N.L.R.B. No. 190 (employer is bound for duration of predecesssor contract once majority status is obtained), *reprinted in* 109 L.R.R.M. (BNA) 1339, 1340 (1982); Hageman Underground Constr., 253 N.L.R.B. 60, 60 (1980) (illustrating maturation of § 9(f) agreement upon achievement of majority status); Land Equip., Inc., 248 N.L.R.B. 685, 685 n.2 (1980) (same), *enforced*, 649 F.2d 867 (9th Cir. 1981); Corrugated Structures, Inc., 252 N.L.R.B. 523, 524 (1980) (union held not to have achieved majority status on project or in permanent and stable work force).

[115] *See* Rayner v. NLRB, 665 F.2d 970, 978 (9th Cir. 1982) (once majority status is achieved in a permanent and stable work force, employer is obligated to apply a contract for its duration); Construction Erectors, Inc. v. NLRB, 661 F.2d 801, 803-05 (9th Cir.

section 8(f) agreement can mature into a section 9 collective bargaining contract if majority status occurs before repudiation. The assumption underlying the maturation process is that, since existence of majority support in a stable workforce would support a voluntary recognition of the union by the employer, the Board will imply a voluntary recognition from the existence of a valid section 8(f) agreement and majority support. In the Board's view the presumptions of continuing majority support afforded unions in section 9 relationships attach to the matured section 8(f) agreement.[116] The employer with a permanent and stable workforce, therefore, is bound by the contract for its duration. In the absence of special circumstances[117] the employer must also bargain with the union for successive contracts.[118]

While this process may stabilize contractual relationships and reduce the need for NLRB resolution of industry disputes, potential for abuse of employee section 7 rights exists. For that reason the Board should not lightly view its task of ascertaining majority status and workforce stability.[119]

Moreover, this maturation process must envision affording some meaning to the substantial protections created by the final proviso to section 8(f). That proviso should operate to prevent

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1981) (obligation to recognize union for duration of contract once majority status achieved, but permanent and stable work force did not actually exist); Land Equip., Inc., 248 N.L.R.B. 685, 685 n.2 (1980) (illustrating maturation of § 8(f) agreement upon achievement of majority status), *enforced*, 649 F.2d 867 (9th Cir. 1981). *But see* NLRB v. Haberman Constr. Co., 641 F.2d 351, 367-68 (5th Cir. 1981) (court expressly declined to apply *Hageman* rule to a project-by-project contractor and reserved issue of whether *Hageman* presumptions would apply to employer with permanent and stable work force).

[116] Irving, *supra* note 28, at 358.

[117] These circumstances might include those justifying a refusal to bargain in a § 9 relationship.

[118] Irving, *supra* note 28, at 362. One writer persuasively urges that prehire agreements should not be available to an employer maintaining a stable work force. *See* Note, *Striking a Proper Balance*, *supra* note 7, at 1020-27.

[119] Substantial inquiry into both issues should occur prior to affording the union a presumption of continuing majority support. The presumption should also remain rebuttable during the contract term by evidence of substantial employee turnover indicating work force instability or by evidence of lack of majority support. *See infra* notes 134-38. Only by allowing the presumption to be rebutted is there a guarantee of protection of employee rights should the erratic nature of construction employment effect the work force in issue.

mature agreements from constituting a contractual bar to an employee decertification petition.[120] Once a union has achieved majority status in a permanent and stable workforce, however, an employer petition should be barred to the same extent it would be in a normal section 9 relationship. Petitions by competing unions similarly should be barred for the duration of the project or, in the case of a permanent and stable workforce, the duration of the contract. No employee's section 7 right is unduly threatened by these proposed contract bar rules.

When a union achieves majority status on one project the Board refuses to allow the project-by-project employer unilaterally to abrogate the prehire agreement's application to that project.[121] Majority status, of course, is presumed only for the duration of this project. Again, the final proviso of section 8(f) should allow employee petitions to be filed at any time during the course of the project. Petitions by employers or competing unions should be barred for the duration of the project upon which a union has achieved majority status.[122]

D. Evidence of Majority Status

The burden of establishing majority status rests squarely with the party claiming existence of an enforceable prehire agreement.[123] In carrying this burden unions may benefit from

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[120] *See* Woelke & Romero Framing, Inc. v. NLRB, 102 S. Ct. 2071, 2082 (1982) (employees may challenge union's representative status by filing election petition); Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 811 n.10 (5th Cir. 1981) (questioning premise that presumption of continuing union support follows from maturation of prehire collective bargaining agreement) (quoting NLRB v. Local 103, Int'l Ass'n of Bridge Workers *(Higdon)*, 434 U.S. 335, 345 (1978)); Note, *Striking a Proper Balance, supra* note 4, at 1018-20 (§ 8(f) should be limited to employers using union hiring hall and prehire agreements should be enforceable for their term absent petition). The NLRB's approach, with refinements suggested herein, *see* notes 114-21 and accompanying text, is the better reasoned approach. *Contra* Precision Striping, Inc. v. NLRB, 642 F.2d 1144, 1147 (9th Cir. 1981) (existence of valid labor agreement does not produce an irrebuttable presumption of majority status).

[121] Pacific Erectors, Inc., 256 N.L.R.B. 421, 424-25 (1981).

[122] Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 811 (5th Cir. 1981).

[123] *Compare* Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 812 (5th Cir. 1981) (union's burden) *with* W.C. James, Inc. v. Oil Chem. & Atomic Workers Int'l Union, 646 F.2d 1292, 1295 (8th Cir. 1981) (employer's

some presumptions. These presumptions, however, should not be coextensive with presumptions of continuing majority status afforded unions certified under section 9, as noted in the previous discussion.

The extent and probative value of evidence relevant to the issue of majority status in a section 8(f) context has not been extensively dealt with by the Board or the courts. Increased litigation over the enforceability of prehire agreements is likely to lead to development of more refined evidentiary tests for determining whether the union has achieved majority status.

In *Precision Striping, Inc.*[124] the Board held that employer repudiation of its prehire agreement constituted an unfair labor practice. The Board reasoned that the union was entitled to an irrebuttable presumption of majority status by virtue of the successful operation of a union security clause. Majority union membership alone was held to justify an irrebuttable presumption of majority status. Further, the Board reasoned that since a majority of employees in a permanent and stable work force were union members, a section 9(a) relationship came into fruition. Thus, the Board concluded that the employer committed an unfair labor practice by repudiating its prehire agreement.[125]

On appeal, the Ninth Circuit denied enforcement and held the existence of union membership alone, particularly in the presence of a union security clause,[126] was not necessarily an accurate barometer of union support.[127] Moreover, the court criticized the Board's finding of an irrebuttable presumption of majority support as conflicting with prior Board decisions.

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burden).

[124] 245 N.L.R.B. 169, 172 (1979), *enforcement denied*, 642 F.2d 1144, 1148 (9th Cir. 1981).

[125] 245 N.L.R.B. at 169-70.

[126] *See* NLRB v. Forest City/Dillon-Tecon Pac., 522 F.2d 1107, 1109 (9th Cir. 1975) (union security clauses make union membership mandatory for all employees covered by the collective bargaining agreement).

[127] 642 F.2d at 1148; *see also* Authorized Air Conditioning Co. v. NLRB, 606 F.2d 899, 906 (9th Cir. 1979) (union membership not always accurate indicator of union support), *cert. denied*, 445 U.S. 950 (1980); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 307 (9th Cir. 1978) (same), *cert. denied*, 442 U.S. 921 (1979); Sahara-Tahoe Corp. v. NLRB, 581 F.2d 767, 772 (9th Cir. 1978) (same), *cert. denied*, 442 U.S. 917 (1979).

In 1971 the Board held in *R.J. Smith Construction Co.*[128] that affording an irrebutable presumption of majority status to a union that is party to a prehire agreement defied logic and public policy. The Board noted that such a presumption conflicts with the final proviso of section 8(f), which provides a prehire agreement is not a contract bar to a representation election.[129] The *Precision Striping* court, however, suggested that if sufficient evidence of majority status were present, a prehire agreement would be converted into a section 9(a) contract and would be governed by the contract bar rule.[130]

Notwithstanding the *Precision Striping* reversal, the Board continues to hold that a union can prove majority status through proof of a union membership.[131] The Board contends proof of a stable and permanent workforce entitles a union to an irrebuttable presumption of majority support at succeeding projects for the duration of the section 8(f) agreement.[132]

While it is impossible to reconcile *R.J. Smith* with the subsequent conflicting views expressed in *Precision Striping* and its progeny, it is fruitful to examine the underpinnings of the Board's shift in analysis. In *R.J. Smith* majoritarian principles buttressed the Board's reasoning. Thus, the Board held an irrebuttable presumption of majority status "irreconcilable" with the statutory safeguards against minority union representation. The dissent focused upon the Act's objective to foster industrial peace and stability because "stability in labor-management relations, can only be achieved if contracting parties are required to adhere to their lawful agreement."[133]

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[128] 191 N.L.R.B. 693 (1971), *order set aside and remanded*, Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1191 (D.C. Cir. 1973) *supplemented*, 208 N.L.R.B. 615 (1974). Since *Higdon*, the D.C. Circuit's decision setting aside the Board's order should not be afforded precedential weight. *See* Washington Area Carpenter's Welfare Fund v. Overhead Door Co., 681 F.2d 1, 7 (D.C. Cir. 1982) (prehire agreement voidable until union achieves majority support).

[129] 191 N.L.R.B. at 694-95.

[130] 642 F.2d at 1147.

[131] *See* Rayel Elec. Co., 260 N.L.R.B. No. 190 (two of three employees union members), 109 L.R.R.M. (BNA) 1339, 1339 (1982).

[132] *Id.*

[133] 191 R.J. Smith Constr. Co., 191 N.L.R.B. 693, 696 (1971) (Fanning and Brown, JJ. dissenting).

Dissenting member Fanning's analytical focus presupposes the lawfulness of the prehire agreement, a presupposition which begs the question. While imposition of a minority union on a docile, nonconsenting majority might serve the ends of "industrial peace and stability," this action hardly affects the principles of majority rule and free choice that are fundamental in the statutory scheme.[134] In view of the provision in section 8(f) that no prehire hire agreement should be construed as a contract bar to a challenge of majority status, it is curious that the Board now *irrebuttably* presumes majority status continues once a "stable" workforce is established. High employee turnover should be a basis for reopening inquiry into majority status, even among "stable" work forces.[135] To do less ignores the section 7 rights of persons hired after the initial determination of majority support.[136]

Any irrebuttable presumption of continuing majority status in a section 8(f) context also undercuts the congressional safety valve found in the section's final proviso.[137] Furthermore, an irrebuttable presumption does not serve to effect employee wishes but preserves and bolsters a union's top-down organizing.[138]

In spite of the situation discussed above, other evidence may create a presumption of majority status at a job site. This evidence includes an enforced union security clause,[139] exclusive

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[134] *Id.* at 695-96. One can only speculate that this type of top-down organizing would have a substantially adverse effect upon industrial peace and stability when nonconsenting, independent-minded employees are locked into labor agreements in this manner.

[135] Employee turnover in a § 9 relationship is not a sufficient basis for terminating a bargaining obligation. *See, e.g.*, NLRB v. A.W. Thompson, Inc., 651 F.2d 1141, 1143 (5th Cir. 1981) (employee turnover and many other factors held insufficient objective criteria to establish good faith doubt regarding the union's majority status to justify withdrawal of recognition from a Board certified bargaining representative).

[136] *See supra* note 23 and accompanying text.

[137] *See* R.J. Smith Constr. Co., 191 N.L.R.B. 693, 694 (1971) (proviso creates statutory safeguard against minority union representation).

[138] Concern over top-down organizing was one consideration leading to congressional passage of § 8(f). *See* 1959 S. REP., *supra* note 38, at 29 (avoidance of "paper unions"), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 425 (1959). It also has been of concern in other contexts. *See, e.g.*, Woelke & Romero Framing, Inc. v. NLRB, 102 S. Ct. 2071, 2077-78, 2080-81 (1982) (hot cargo, unlawful union security).

[139] *See, e.g.*, Davis Indus., Inc., 232 N.L.R.B. 946, 952 (1977) (union acquired major-

union hiring hall referrals,[140] or a vote at a union meeting.[141] These indicia are not exclusive of other evidence. Other factors—such as a signed petition or authorization cards,[142] concerted conduct,[143] wearing union buttons or insignia, or voluntary payment of dues—taken alone or together, may raise rebuttable presumptions of majority status.[144]

The Board's election procedures can also be invoked to validate a prehire areement. This method clearly would be the preferred method in a permanent and stable workforce.[145] In this instance the legislative concerns, such as an unstable employee compliment, by definition do not exist. Indeed, no difficulty in the elections process would be present since such a workforce

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ity status over pipeline workers); Williams Enter., Inc., 212 N.L.R.B. 880, 885 (1974) (compliance with union security clause by employer recognizes majority status); Komatz Constr., Inc., 191 N.L.R.B. 846, 852 (1971)(union security clause in prior contracts with Teamsters); R.J. Smith Constr. Co., 191 N.L.R.B. 693, 695 n.5 (1971) (enforcement of union security agreement may create a rebuttable presumption of majority status). *But see* Precision Striping, Inc. v. NLRB, 642 F.2d 1144, 1147 (9th Cir. 1981) (union membership not sufficient to establish majority status particularly when a union security clause ensures that union membership is a condition of continued employment).

[140] There is some suggestion that hiring hall referrals will be probative of union adherence, and as a practical matter, this is likely the case. A union, legally and theoretically, should not discriminate in its referrals of union or nonunion workers. *See infra* note 266. In actual practice, however, nonunion employees are, in the absence of a Board order, rarely referred out through hiring halls. Thus, the discriminatory effects of the hiring hall system should not be allowed to help establish the existence of uncoerced majority support.

[141] *See, e.g.*, Guy H. Jones Constr. Co., 191 N.L.R.B. 282, 282 (1971) (designation cards signed by majority of employees); Mishara Constr. Co., 171 N.L.R.B. 471, 471 (1968) (strike vote).

[142] *Cf.* Harding Glass Indus., Inc. v. NLRB, 533 F.2d 1065, 1069 (8th Cir. 1976) (employer consented to card, which proved majority support, as valid to support voluntary recognition); NLRB v. Orlando Paper Co., 480 F.2d 1200, 120102 (5th Cir. 1973) (authorization cards should be used to establish majority support only when election not feasible).

[143] *See* Materials Research Corp., 262 N.L.R.B. No. 122, (concerted activity sufficient to establish majority support) 110 L.R.R.M. (BNA) 1401 (1982).

[144] *Cf.* Linden Lumber Div. v. NLRB, 419 U.S. 301, 315 (1974) (Stewart, J., dissenting) (Board may base majority support on objective standards); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 597 (1969) (majority status can be shown by a variety of means); United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62, 72 & n.8 (1956) (election is not only method to establish majority status).

[145] *See supra* notes 114-22 and accompanying text. One writer boldly suggests that Board-conducted elections shoud be preferred when a permanent and stable work force exists. *See* Note, *Striking a Proper Balance*, *supra* note 4, at 1018-20.

carries over from project to project.

V. Enforceability of Prehire Agreements in Section 301 Suits: The Conflict in Circuits

Courts differ markedly regarding whether inchoate section 8(f) agreements are enforceable[146] in a proceeding under section 301 of the Labor Management Relations Act (LMRA).[147] Section 301 permits suits for breach of contract by an employer or a labor union.[148] A union may sue for injunctive relief and damages in federal court to enforce the provisions of its contract with an employer.[149] Rather than attacking, by use of unfair labor practice charges, an employer's withdrawal of recognition, or refusal to abide by the terms of a prehire agreement, unions have more recently sought to enforce prehire agreements, particularly fringe benefit provisions of those agreements, through section 301 proceedings.[150]

In *New Mexico District Council of Carpenters v. Mayhew Co.*,[151] the employer signed a collective bargaining agreement in 1968 recognizing the union "as the sole and exclusive bargaining representative for the workmen employed to perform . . . construction work." The agreement required the employer to pay specified wages and to contribute to the union's fringe benefit funds on behalf of those employees. Between 1968 and 1977 the employer made pension contributions on behalf of only two of eight employees. The union filed a section 301 suit alleging

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[146] *See supra* notes 74 and 80.

[147] The Act is codified at 29 U.S.C. § 185(a) (1976) and states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jursidiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[148] *See, e.g.*, Jensen v. Farrell Lines, Inc., 658 F.2d 27, 29 (2d Cir. 1981) (union, not employees, could litigate contract); White Motor Corp. v. International Union, 491 F.2d 189, 190 (2d Cir. 1974) (either party may enforce agreement).

[149] *See, e.g.*, Whelan v. Colgan, 602 F.2d 1060, 1062 (2d Cir. 1979) (injunction); International Bhd. of Elec. Workers v. A-1 Elec. Serv., Inc., 535 F.2d 1,4 (10th Cir. 1976) (damages).

[150] *See supra* note 80.

[151] 664 F.2d 215 (10th Cir. 1981).

breach of contract and seeking damages, including back wages and fringe benefits for the other six employees.[152]

The employer defended the suit alleging, among other things, that under *Higdon* section 8(f) agreements can be retroactively and unilaterally ignored by the employer until the union achieves majority status in the relevant bargaining unit. In essence, the employer argued that section 8(f) agreements were void and not enforceable until the union achieved majority status. On appeal, the Tenth Circuit rejected this defense and construed *Higdon* to control only unfair labor practice proceedings.[153] The court held the employer's unfair labor practice defense was not a defense to a section 301 action.[154] Holding the provisions of the agreement enforceable prospectively, the court enjoined the employer's refusal to abide by the terms of the agreement for its duration.[155]

The *Mayhew* court relied upon *Contractors, Laborers, Teamsters, & Engineers Health & Welfare Plan v. Associated Wrecking Co.*,[156] an Eighth Circuit case, which also had refused to hold that *Higdon* controlled the disposition of a section 301 suit.[157] The Eighth Circuit reasoned that an employer voluntarily entering into an 8(f) agreement could not raise the illegality of that agreement as a bar to a section 301 suit to enforce the wage and benefit provisions or the pension and welfare contribu-

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[152] *Id.* at 216-17.

[153] *Id.* at 219.

[154] *Id.* at 217. In a subsequent decision, the Supreme Court rejected the argument that unfair labor practices or other unlawful conduct could not constitute defenses to § 301 suits. Kaiser Steel Corp. v. Mullins, 102 S. Ct. 851, 858-60 (1982); *see infra* text accompanying notes 183-97.

[155] 664 F.2d at 220; *accord* Welfare Trust v. Richerson Painting Co., 109 L.R.R.M. 2362, 2363-64 (W.D. Tenn. 1981) (prospective enforceability ordered until agreement terminated in accordance with its provisions). One district court cites the "strong national labor policy favoring enforcement of labor contract," to justify prospective enforceability. Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 411 (N.D. Ill. 1982). The court's conclusion that a minority union's prehire agreement should be afforded enforcement for the same policy considerations that support enforcement of a majority union's contract was not adequately explained or related to those underlying policy considerations. The court limited *Higdon* to dealing with coercive picketing in an unfair labor practice context and determined, incorrectly, that breach of contract actions "pose no significant risk to employee free choice." *Id.* at 414; *see infra* notes 159, 222, and accompanying text.

[156] 638 F.2d 1128 (8th Cir. 1981).

[157] *Id.* at 1132-34.

tion requirements. Those contracted-for payments "inured" to the benefit of individual workers when they became employed, regardless of majority status.[158] Moreover, the court reasoned, the employer had already received consideration for its expected performance. The employer (1) was aware of his labor costs in advance of his bidding on the project; (2) had available to him a skilled union labor pool; and (3) by entering into the agreement, insured labor peace at his work site. The employer who accepts these benefits, the court noted, must also honor its obligations under the agreement.[159]

Neither circuit court addressed the fundamental premise underlying section 8(f)—that a prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship.[160] The restrictive reading afforded *Higdon,* that it applies only to unfair practice proceedings, is not adequately explained. The *Higdon* Court specifically characterized the employer's obligation as "unenforceable" in a section 301 suit until the union showed the existance of majority status at the effected project.[161] The *Higdon* Court expressly approved the application of 8(f) principles to section 301 cases when it summarized its opinion:

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[158] *Id.* at 1134.

[159] *Id.* Only fringe benefit contributions were at issue in *Associated Wrecking. Id.* at 1129. But the court's reasoning implies that all terms of the prehire agreement would be enforceable by a minority union. *But see* Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 812 (5th Cir. 1981) (wage and fringe benefit portions of prehire agreement unenforceable absent evidence of majority support).

If all contract provisions are enforceable, a minority union could enforce hiring hall provisions, union security clauses, and provisions requiring notification of intent to repudiate the agreement. *See* Carpenters Conference Bd. v. M.L. Meddles Co., 535 F. Supp. 775, 779 (N.D. Cal. 1981) (lack of majority status no bar to enforceability of arbitration provisions).

Allowing a minority union this leverage interferes impermissibly with employees' § 7 rights. For example, an employer could be compelled to enforce a union security clause to assist the union in the attainment of majority support. While § 8(f) countenances voluntary acquiescence in these tasks, Congress mandated that the voluntariness requirement in § 8(f) not be circumvented. 29 U.S.C. § 158(f) (1976).

[160] *See* NLRB v. Local 103, Int'l Ass'n of Bridge Workers, (*Higdon*), 434 U.S. 335, 344 (1978) (Court mentions premise but does not discuss further) (citing Ruttman Constr. Co., 191 N.L.R.B. 701, 702 (1971).

[161] 434 U.S. at 351-52.

> It would not be inconsistent with *Lion Dry Goods*[162] for a court to hold that the union's majority standing is subject to litigation in a section 301 suit to enforce a section 8(f) contract, just as it is in a section 8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable.[163]

The Eighth Circuit redefined its *Associated Wrecking* rationale in *W.C. James, Inc. v. Oil, Chemical, & Atomic Workers International Union*,[164] a case that reached the court in an unusual posture. It involved an attempt by an employer to enforce a prehire agreement. The employer, a pipeline construction contractor, was awarded the Iowa portion of a multi-state pipeline project by the general contractors, Dome Pipeline Corporation and Williams Brothers Engineering. As a condition of its contract with Dome-Williams, James was required to secure a prehire agreement with the Oil, Chemical, and Atomic Workers Union (OCAW). James and OCAW attempted to enter into a prehire agreement on August 18, 1977.[165] On August 19, OCAW informed James it was repudiating the prehire contract. As a result, James lost its contract with Dome-Williams and thereafter sought to enforce the 8(f) agreement in a section 301 action. The employer argued that *Associated Wrecking,* compelled enforcement of the prehire agreement it allegedly consumated with OCAW. The court rejected this argument, noting that *Associated Wrecking* involved enforcement of the terms of a prehire agreement to past performance when the employer's promises had matured into enforceable obligations. The *James* court rationalized that the remedy sought in *Associated Wrecking*, retrospective enforcement, differed from the prospective enforce-

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[162] Although Retail Clerks Int'l Ass'ns. v. Lion Dry Goods, 369 U.S. 17, 29-30 (1962) holds that a federal court in a § 301 suit may entertain suits by minority unions to enforce their contracts, these contracts are not necessarily enforceable. As the *Higdon* Court properly noted, *Lion Dry Goods* was a jurisdictional decision determining that the federal court possessed jurisdiction to hear the controversy. 434 U.S. at 351-52.

[163] *Higdon*, 434 U.S. at 351; *cf.* Kaiser Steel Corp. v. Mullins, 102 S. Ct. 851, 860 (1982) (existence of illegal clause renders contract unenforceable).

[164] 646 F.2d 1292, 1295 n.4 (8th Cir. 1981).

[165] *Id.* at 1293. Though the court found no prehire contract had acutally been entered into, it nevertheless addressed the important issue of enforceability of § 8(f) contracts in a § 301 context.

ment sought in the case before it. Since the union's promises had not matured into an enforceable obligation, its repudiation, before majority status was attained, voided the agreement.[166]

This decision implies that prehire agreements in the Eighth Circuit are completely enforceable until repudiated. After repudiation, which is effective only in the absence of a union's majority status, the prehire agreement is utterly void. This position was adopted by the Ninth Circuit in *Todd v. Jim McNeff, Inc.*,[167] which held prehire agreements voidable by an employer until the union achieves majority status. Prior to an employer's repudiation, the Ninth Circuit noted, the contract is "fully enforceable" under section 301.[168]

The *McNeff* court found the *Higdon* opinion was written too broadly to infer that it applied only to unfair labor practice proceedings.[169] It focused instead upon the Supreme Court's use of the word "voidable," as opposed to the word "void," in describing section 8(f) prehire agreements.[170] The void/voidable distinction and other policy considerations inspired the *McNeff* court to reach a compromise result similar to that reached in *James*. It would be inequitable to hold no enforceable contract exists when one party has enjoyed the benefits of the 8(f) agreement.[171] Thus, the court fashioned a compromise to protect these equity interests, by allowing repudiation to void the agreement, but finding the underlying obligations enforceable until repudiated.[172] The court reasoned that this result would diminish the inequity whereby an employer could entice, by silence, a minority union into performing, while never intending to perform on its own obligation.[173]

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[166] 646 F.2d at 1294-95 n.4.

[167] 667 F.2d at 800 (9th Cir. 1982), *cert. granted*, 102 S. Ct. 3508 (1982).

[168] *Id.* at 804.

[169] *Id.* at 803.

[170] *Id.* at 803-04.

[171] *Id.* at 803.

[172] *Id.* While the court did not address the point, it is clear the repudiation envisioned must be communicated to the union. *See* Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 9 n.38 (D.C. Cir. 1982) (union and employees must be put on notice that contract is voided).

[173] 667 F.2d at 805. *But see*, Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 412 (N.D. Ill. 1982) (enforcement compelled because "basic fairness" should prevent

The United States Court of Appeals for the Fifth Circuit has reached a contrary result. In *Baton Rouge Building & Construction Trades Council v. E.C. Schafer Construction*[174] it held that an 8(f) agreement becomes an enforceable contract only upon "a showing" of union majority status in the relevant bargaining unit. Without this showing, section 8(f) agreements do "not flower into enforceable contracts."[175]

The *Schafer* position squares with section 8(f) principles developed in the unfair labor practice context, and the Supreme Court's language in the *Higdon* opinion. The Fifth Circuit expressly rejected the broad view of section 301 enforceability originally adopted in *Associated Wrecking* and currently propounded by the Tenth Circuit in *Mayhew*.[176] The Fifth Circuit could not harmonize the restrictive interpretation that the *Higdon* analysis applied only to unfair labor practice cases with the Supreme Court's express language holding 8(f) agreements "unenforceable" until majority status is achieved.[177]

The *Schafer* court did not expressly address the compromise position embraced in *James* and *McNeff*, but propounded a forceful answer to the espoused "policy considerations." The true goal of the NLRA is the "insurance of *employee* free choice," within the framework of majoritarian principles governing the selection of a bargaining representative.[178] In view of the "prevailing statutory policy that a union should not purport to act as the collective bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the

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promises being broken with impunity); *but cf.*, Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger Co., 672 F.2d 580, 585 (6th Cir. 1982) (basic fairness does not require general contractor in § 301 suit to pay pension contributions owed by subcontractor despite union contract clause in which the general contractor reserved the right to escrow funds to insure benefits were paid to subcontractors' employees).

[174] 657 F.2d 806 (5th Cir. 1981); *accord* Paddack v. Clark, 107 L.R.R.M. (BNA) 2325, 2327 (D. Or. 1980) (majority status as condition precedent to enforceability of prehire agreement), *rev'd*, 673 F.2d 1339 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3988 (June 15, 1982) (No. 81-1946).

[175] 657 F.2d at 809; *accord* Laborers Dist. Council v. McDowell Contractors, Inc., 680 F.2d 94, 95 (11th Cir. 1982) (terms of area-wide prehire labor agreement not enforceable absent showing of union majority).

[176] 657 F.2d at 812-13.

[177] *Id.* at 812 n.12 (citing *Higdon*, 434 U.S. at 351).

[178] 657 F.2d at 813.

majority of the employees of the unit,"[179] the Fifth Circuit's view emphasizes the basic majoritarian principles of our national labor policy more than the compromise views adopted in other circuits. Moreover, a union's legitimate interests in preserving the benefit of its collectively bargained for prehire agreement is protected by the ease with which it could establish majority status.[180]

In a recent decision, the United States Court of Appeals for the Eleventh Circuit ruled that, until a union has shown it represents a majority of employees on a given construction project, neither it nor its pension fund trustees could enforce the terms of a prehire agreement.[181] The per curiam affirmance noted that

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[179] *Higdon*, 434 U.S. at 344.

[180] *See supra* notes 139-44 and accompanying text. The Board's election processes are the preferred method of establishing a union's right to represent employees. *See, e.g.*, NLRB v. Cott Corp., 578 F.2d 892, 894-95 (1st Cir. 1978) (elections preferred method of ascertaining employee choice). Section 8(f) represents a compromise exception to this preferred mechanism. Congress recognized the duration of employment in the construction industry made the elections process unwieldy. Congress, however, carefully safeguarded employee rights by the final proviso of 8(f), which does not make an 8(f) agreement a bar to election petitions. A union must carry the burden of justifying its right to act as an exclusive bargaining agent. That right should not lightly be assumed absent evidence supporting a presumption of majority support. The effect of 8(f) is to minimize that burden in a construction context. That minimal burden is to require a union to show majority support among the employees it seeks to represent. This burden is *far* less substantial than the burden imposed upon unions seeking to represent employees in stable industries. As noted at text accompanying footnotes 139-45, *supra*, a union supported by a majority of the affected employees should easily be able to show majority support.

Concerning existing projects upon which unions and employees might be relying upon the provision of the prehire agreement, employers will not lightly repudiate the agreement for fear the union will be able to show majority support, and thus expose the employer to unfair labor practice charges or demands under § 301. Direct employer inquiry into union affiliation has long been deemed coercive of employee § 7 rights. It is an interrogation in violation of § 8(a)(1) regardless of the union's majority status. *See infra* note 206 and accompanying text. Because an employer cannot be certain that majority status is achieved on the ongoing project, he likely will repudiate for future projects only.

The prudent management labor lawyer could advise prospective repudiation only. The employer's exposure should thus be limited in the Eighth, Ninth, and District of Columbia Circuits to welfare fund obligations incurred prior to repudiation. By waiting until the prehire agreement expires, under its own terms, an employer should be able to avoid § 301 liability entirely, even in the Tenth Circuit. The Fifth and Eleventh Circuits, so far, have refused to allow minority union enforcement of any provisions of a prehire agreement.

[181] Laborers Dist. Council v. McDowell Contractors, Inc., 680 F.2d 94, 95 (11th Cir.

"clear precedent" controlled the result.[182] That clear precedent is the construction the Eleventh Circuit afforded the Supreme Court's opinion in *Kaiser Steel Corp. v. Mullins*.[183] The Eleventh Circuit construed *Kaiser* to hold an employer's pension fund obligations unenforceable if the underlying labor management agreement is itself unenforceable.[184]

The employer in *Kaiser* entered into a collective bargaining agreement that constituted the fruits of a longstanding section 9 relationship with the United Mine Workers of America (UMW). Under the terms of the agreement the employer was obligated to

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1982). A recent panel decision, however, indicated the issue of enforceability of minority status prehire agreements by pension fund trustees may remain open in the Fifth Circuit. *See* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 527 n.19 (5th Cir. 1982). There, the Fifth Circuit instructed the district court to consider on remand whether lack of majority status is a defense in suits brought by pension fund trustees in light of Lewis v. Benedict Coal Corp., 361 U.S. 459, 470-71 (1960), which held that a union's violation of a no strike clause could not be asserted as a defense in a suit brought by trustees of a welfare fund, and Kaiser Steel Corp. v. Mullins, 102 S. Ct. 851, 857 (1982), in which the Court held that a defense of the illegality of a collective bargaining agreement is a defense against a union trust fund. A federal district court considered this precise issue in Carpenters Amended & Restated Health Benefit Fund v. Copes & Smith, Inc., 544 F. Supp. 442 (N.D. Tex. 1982), *appeal pending*, Civil Action No. 82-1419 (5th Cir. 1982), and agreed with the contractors' argument that lack of majority status was a defense in an action brought by trustees to recover fund contributions. 544 F. Supp. at 450. The court observed that under *Kaiser* the issue whether a defense against the union can be asserted against trustees "turns on whether the contribution provision is inextricably tied to the prehire agreement." *Id.* at 448. In *Benedict Coal*, the language of the collective bargaining agreement made it clear that adherence to the no strike clause was not a condition precedent to payment of royalties. In *Kaiser*, however, the employer "did not make a naked promise to pay money to union funds." *Id.* at 450. Rather, the promise was linked to an illegal hot-cargo agreement. The *Copes & Smith* court concluded that the promise to make contributions was similarly linked to an unenforceable prehire agreement and was therefore unenforceable. *Id.* The court further held that "the proposition that the Trustees' enforcement action does not implicate the issue of employee free choice must be rejected." *Id.* at 447. The district court in Carpenters Health & Welfare Trust Fund v. Reis, 525 F. Supp. 1141 (E.D. Cal. 1981), reached a contrary result, but withdrew its opinion from publication after the Supreme Court rendered its decision in Kaiser Steel Corp. v. Mullins, 102 S. Ct. 851 (1982). Carpenters Amended & Restated Health Benefit Fund v. Copes & Smith, Inc., 544 F. Supp. at 448.

[182] Laborers Dist. Council v. McDowell Contractors, 680 F.2d 94, 95 (11th Cir. 1982); *accord* Carpenters Pension Fund v. Sorenson, 108 L.R.R.M. 2988, 2989-90 (N.D. Ill. 1981) (prehire agreement unenforceable until majority support proven).

[183] 102 S. Ct. 851 (1982).

[184] Laborers Dist. Council v. McDowell Contractors, 680 F.2d 94, 95 nn.2-3 (11th Cir. 1982).

from employees who had performed work under contract.[201]

VI. ANALYSIS

This section attempts to synthesize case law and industry practices and evaluate the enforceability of 8(f) agreements in light of our national labor policies. Virtually all post-*Higdon* legal commentary decries the destabilizing impact nonenforceability of prehire agreements will have on the industry.[202] The appeals courts, however, were less concerned about destabilization than top-down selection of a minority union as a bargaining representative. They have consistently rejected enforcement of an agreement when enforcement could substantially contribute to top-down organizing.[203] On the other hand, when equitable factors may suggest partial enforcement until repudiation, some courts have allowed enforcement to collect funds allegedly due by past operation of the agreement.[204] This is particularly true with regard to suits by trustees of union pension and welfare funds.[205]

Suits by fund trustees avoid several arguments that are advanced against minority union enforceability. Direct suits by unions, for example, must overcome two substantial arguments. First, contentions are made that injuries to minority unions are

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[201] *Id.* at 9; *see* Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 412 (N.D. Ill. 1982) (notions of basic fairness and characterization of pension obligation as "compensation" justify retrospective *and* prospective enforcement).

[202] *See supra* note 7. Because the NLRB, and all courts of appeal deciding the issue since *Higdon*, have held prehire agreements were not enforceable by minority unions through unfair labor practice proceedings, it is unlikely that limited enforceability in a § 301 context will afford any stabilizing effect over construction industry labor relations. Enforceability in one context and not in the other will likely breed confusion and complexity, which could increase instability and litigation.

[203] In upholding prerepudiation enforcement, the D.C. Circuit expressly observed that suit by fund trustees for past due obligations does not create prospective obligations or impair employee free choice. Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 10 (D.C. Cir. 1982).

[204] *See, e.g.*, Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 9-10 & n.39 (D.C. Cir. 1982) (obligations arising under prehire agreement enforceable when agreement never repudiated); Todd v. Jim McNeff, Inc., 667 F.2d 800, 804 (9th Cir. 1982) (until repudiation, contract is enforceable to recover contributions), *cert. granted*, 102 S. Ct. 3508 (1982); W.C. James, Inc. v. Oil Chem. & Atomic Workers Int'l Union, 646 F.2d 1292, 1295 n.4 (8th Cir. 1981) (agreement had never been operable).

[205] *See* cases cited *supra* note 204.

the justifiable result of the employees' conscious section 7 choice, or such injuries are self-inflicted by insufficient union efforts to achieve majority status.[206] Second, the argument is advanced that enforcement of certain provisions, such as hiring hall, union seniority, arbitration, and notification of termination, would act to extend the contract beyond repudiation and potentially might impact adversely on the protected rights of the nonconsenting employee majority.[207]

These reasons probably explain why enforcement litigation has predominately been instituted by third-party pension and welfare fund trustees. This litigation is ostensibly conducted for the benefit of employees who, by performance under the agreement, are assumed to have accrued unpaid "benefits."[208] The favored status of fund trustees is underscored by the legislative history of the Multiemployer Pension Plan Amendment Act of 1980.[209] Similarly, there is less likelihood of interference with

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[206] Given the wide-ranging, relatively simple methods of showing majority support under a prehire agreement, *see supra* notes 139-45 and accompanying text, this burden rightfully belongs to the union. Requiring an employer to disprove majority status would impose the undue burden of proving the nonexistence of a condition precedent to enforceability. The employer also risks unfair labor practice charges if its inquiry is subsequently found to be coercive. *See* Paceco v. NLRB, 601 F.2d 180, 182-83 (5th Cir. 1979) (interrogation of employees proscribed when coercive); NLRB v. West Coast Casket Co., 205 F.2d 902, 904 (9th Cir. 1953) (use of coercive tactics during interrogation of employees sympathetic to union); *cf.* Louis-Allis Co. v. NLRB, 463 F.2d 512, 517 (7th Cir. 1972) (employer polls inherently more coercive than union polls); Struksnes Constr. Co., 165 N.L.R.B. 1062, 1064 (1967) (polling violates Act unless (1) purpose is to determine truth of union's claim of majority status, (2) purpose is communicated to employees, (3) assurances against reprisal are given, (4) poll is conducted by secret ballot, and (5) employer has committed no unfair labor practices or otherwise created coercive atmosphere). *But cf.* Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1252 (5th Cir. 1978) (interrogation by low-ranking supervisor not a violation). Requiring employees to present proof would create undue burdens upon protected § 7 rights. For example, an employee has the right to refrain from being coerced into announcing his support or lack of support for the union. *See, e.g.*, Hassett Maintenance Corp., 260 N.L.R.B. No. 135, 109 L.R.R.M. (BNA) 1273, 1273 (1982) (improper employer poll); Gruber's Food Center, Inc., 159 N.L.R.B. 629, 630 (1966) (interrogations concerning union sympathies).

[207] An example of adverse impact would be enforcement of a seniority system when a majority of the employees prefer to be compensated under a merit system.

[208] *See* Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 9 (D.C. Cir. 1982) (union's welfare fund brought suit against employer); Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 412 (N.D. Ill. 1982) (same).

[209] Pub. L. No. 96-364, § 102-08, 94 Stat. 1208, 1210-70 (1980) (codified in scattered sections of 29 U.S.C. Supp. IV (1980)). Congress recognized that "the collectively bar-

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[202] *See supra* note 7. Because the NLRB, and all courts of appeal deciding the issue since *Higdon*, have held prehire agreements were not enforceable by minority unions through unfair labor practice proceedings, it is unlikely that limited enforceability in a § 301 context will afford any stabilizing effect over construction industry labor relations. Enforceability in one context and not in the other will likely breed confusion and complexity, which could increase instability and litigation.

[203] In upholding prerepudiation enforcement, the D.C. Circuit expressly observed that suit by fund trustees for past due obligations does not create prospective obligations or impair employee free choice. Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 10 (D.C. Cir. 1982).

[204] *See, e.g.*, Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 9-10 & n.39 (D.C. Cir. 1982) (obligations arising under prehire agreement enforceable when agreement never repudiated); Todd v. Jim McNeff, Inc., 667 F.2d 800, 804 (9th Cir. 1982) (until repudiation, contract is enforceable to recover contributions), *cert. granted*, 102 S. Ct. 3508 (1982); W.C. James, Inc. v. Oil Chem. & Atomic Workers Int'l Union, 646 F.2d 1292, 1295 n.4 (8th Cir. 1981) (agreement had never been operable).

[205] *See* cases cited *supra* note 204.

the justifiable result of the employees' conscious section 7 choice, or such injuries are self-inflicted by insufficient union efforts to achieve majority status.[206] Second, the argument is advanced that enforcement of certain provisions, such as hiring hall, union seniority, arbitration, and notification of termination, would act to extend the contract beyond repudiation and potentially might impact adversely on the protected rights of the nonconsenting employee majority.[207]

These reasons probably explain why enforcement litigation has predominately been instituted by third-party pension and welfare fund trustees. This litigation is ostensibly conducted for the benefit of employees who, by performance under the agreement, are assumed to have accrued unpaid "benefits."[208] The favored status of fund trustees is underscored by the legislative history of the Multiemployer Pension Plan Amendment Act of 1980.[209] Similarly, there is less likelihood of interference with

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[206] Given the wide-ranging, relatively simple methods of showing majority support under a prehire agreement, *see supra* notes 139-45 and accompanying text, this burden rightfully belongs to the union. Requiring an employer to disprove majority status would impose the undue burden of proving the nonexistence of a condition precedent to enforceability. The employer also risks unfair labor practice charges if its inquiry is subsequently found to be coercive. *See* Paceco v. NLRB, 601 F.2d 180, 182-83 (5th Cir. 1979) (interrogation of employees proscribed when coercive); NLRB v. West Coast Casket Co., 205 F.2d 902, 904 (9th Cir. 1953) (use of coercive tactics during interrogation of employees sympathetic to union); *cf.* Louis-Allis Co. v. NLRB, 463 F.2d 512, 517 (7th Cir. 1972) (employer polls inherently more coercive than union polls); Struksnes Constr. Co., 165 N.L.R.B. 1062, 1064 (1967) (polling violates Act unless (1) purpose is to determine truth of union's claim of majority status, (2) purpose is communicated to employees, (3) assurances against reprisal are given, (4) poll is conducted by secret ballot, and (5) employer has committed no unfair labor practices or otherwise created coercive atmosphere). *But cf.* Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1252 (5th Cir. 1978) (interrogation by low-ranking supervisor not a violation). Requiring employees to present proof would create undue burdens upon protected § 7 rights. For example, an employee has the right to refrain from being coerced into announcing his support or lack of support for the union. *See, e.g.*, Hassett Maintenance Corp., 260 N.L.R.B. No. 135, 109 L.R.R.M. (BNA) 1273, 1273 (1982) (improper employer poll); Gruber's Food Center, Inc., 159 N.L.R.B. 629, 630 (1966) (interrogations concerning union sympathies).

[207] An example of adverse impact would be enforcement of a seniority system when a majority of the employees prefer to be compensated under a merit system.

[208] *See* Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 9 (D.C. Cir. 1982) (union's welfare fund brought suit against employer); Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 412 (N.D. Ill. 1982) (same).

[209] Pub. L. No. 96-364, § 102-08, 94 Stat. 1208, 1210-70 (1980) (codified in scattered sections of 29 U.S.C. Supp. IV (1980)). Congress recognized that "the collectively bar-

employees' section 7 rights since the trustees could not seek enforcement of other provisions of the agreement. To date courts have not adequately addressed the extent to which a minority union may, through section 301 proceedings, seek enforcement or damages for employer breach of other substantive provisions of the agreement.

A. Prospective Enforceability

Since *Higdon*, the Tenth Circuit stands alone among the circuits in affording a minority union prospective enforcement of repudiated prehire agreements.[210] Several district courts have attempted to justify prospective enforcement with unpersuasive reasoning.[211] In *Martin v. Benesh & Bruns, Inc.*,[212] a district

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gained obligation of an employer to contribute to [pension plans] merits special treatment under ERISA . . . ." SENATE COMM. ON LABOR & HUMAN RESOURCES, 96TH CONG., 1ST SESS. THE ERISA IMPROVEMENTS ACT OF 1979: SUMMARY AND ANALYSIS OF CONSIDERATIONS 45 (Comm. Print 1979) (quoting proposed ERISA § 515). *See generally* Comment, *Denying the Illegality Defense: An Enigmatic Approach to the Delinquent Pension Fund Contribution Problem*, 34 STAN. L. REV. 221, 235-43 (1981) (ramifications). It is questionable whether the 1980 Pension Act Amendments afford any substantive protection to obligations lawfully repudiated. *But see* Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 5 (D.C. Cir. 1982) (prehire issue resolved on basis of § 8(f)). The 1980 Pension Act did not refer to § 8(f). 681 F.2d at 5. The issue in a repudiation context, as was present in *Kaiser*, is the lawful effect of the obligation to contribute. In *Kaiser*, the existence of an unlawful contributions clause was held to be a defense allowing employer to void contribution obligations. 102 S. Ct. at 860-62. It would be anomalous to reach a contrary result when the underlying agreement establishing contribution provisions is repudiated, void and unenforce able in all other contexts. In that instance, the obligation admittedly may have been lawful, but it has ceased to exist. *See* Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 808-09 (5th Cir. 1981) (prehire agreements lawful, but not enforceable until union achieves majority status).

[210] *See* New Mexico Dist. Council of Carpenters v. Mayhew Co., 664 F.2d 215, 219-20 (10th Cir. 1981) (agreement enforced). The Eighth Circuit retreated from that position in W. C. James, v. Oil Chem. & Atomic Workers Int'l Union, 646 F.2d 1292, 1294-95 & n.4 (8th Cir. 1981). *See supra* text accompanying notes 164-66.

[211] Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 411-12 & n.3 (N.D. Ill. 1982); Welfare Trust v. Richardson Painting Co., 109 L.R.R.M (BNA) 2362, 2364 (W.D. Tenn. 1981); Pension Fund v. Southern Stress Wire Corp., 108 L.R.R.M. 2982, 2086-87 (N.D. Ga. 1981).

[212] 532 F. Supp. 408 (N.D. Ill. 1982). In a subsequent opinion from that district, a different judge reserved the issue of prospective enforceability, citing W. C. James v. Oil Chem. & Atomic Workers Int'l Union, 646 F.2d 1292 (8th Cir. 1981). Chicago Dist. Council of Carpenters Pension Fund v. Skrede, 542 F. Supp. 634, 635 n.2 (N.D. Ill. 1982).

court ordered employees to make pension fund contributions as specified in the prehire agreement with a minority union. The court suggested prehire agreements should be governed by the same policy considerations that govern enforcement of collective bargaining contracts in a section 9 context. This reasoning blurs the substantial differences between the two types of obligations and ignores the safeguards Congress erected under section 8(f). This threshold assumption is the first of a number of unpersuasive arguments the court relies upon to conclude that "national labor policy favors the enforcement of prehire contracts without regard to the majority status of a union."[213] We have focused upon the *Martin* opinion because (1) it affords the broadest view of enforceability by a minority union of its prehire agreement and (2) the opinion's anomalous reasoning is fundamentally flawed.

To overcome *Higdon* the court limits it as controlling only coercive picketing impinging upon employee free choice.[214] That limitation seems unwarranted in view of *Higdon's* express language and the subsequent appeals court decisions affording broader import to the decision.[215]

The *Martin* court also suggested Congress intended to relieve a union of the obligation to show majority status because Congress perceived organizing in the construction industry as too difficult.[216] Congress was not, however, addressing the difficulties of *organizing* in the industry. It sought to correct the inability of the NLRB's election process to certify majority support because of the unstable employment relationships in the industry.[217] The union's inability to organize was not a congres-

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[213] 532 F. Supp. at 416.

[214] *Id.* at 414.

[215] *See* cases cited *supra* note 74.

[216] 532 F. Supp. at 415-16.

[217] *See* 1959 S. REP., *supra* note 38, at 55 ("Representation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment . . . ."), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 451 (1959); 105 CONG. REC. 18,128 (1959) (remarks of Senator Kennedy), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 1715 (1959). As noted previously, the industry was virtually organized at the time of the passage of § 8(f). *See supra* note 52 and *infra* notes 218, 223, and accompanying text.

sional concern. In fact, Congress assumed construction workers were so organized by the craft unions that prehire agreements inevitably would lead to majority support once the workforce was hired.[218]

It is also ludicrously suggested in *Martin* that unenforceability would aid "top-down" organizing. The court theorizes that unions will garner support by showing employees what they stand to lose if the employer is allowed to repudiate.[219] Truthfully informing employees under a prehire agreement that lack of majority status may allow the employer to repudiate is nothing more than lawful propagandizing. This is the very type of communications in which a union should engage to educate employees so that they can make an informed section 7 choice. The existence of this valuable propaganda tool is indicative that a union's burden of persuading employees is not substantial. The employer has in no way unlawfully assisted the union in its organizing efforts. In fact, the possibility of unlawful collusion between the employer and union leading to "top-down" organizing is foreclosed by the employer's repudiation.

In those jurisdictions allowing prospective enforcement of prehire agreements by minority unions, one must assume that damages for breaches of hiring hall, union security, arbitration, notification, or other provisions establishing obligations owed to a union are similarly enforceable.[220] It would seem illogical to enforce only part of the contract prospectively.[221] The risk of im-

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The court's analysis of the congressional debates on the ERISA amendments is similarly flawed. Reliance upon the inserted remarks of two disgraced former members of Congress (Abscam), known for their consistent support of labor causes, hardly gives insight into Congress' intent concerning enforce ability of prehire agreements. *See* Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 416 n.11 (N.D. Ill. 1982) (reliance on ERISA amendments is perilous).

[218] 1959 S. REP. *supra* note 38, at 28, 55-56, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 424, 451-52 (1959).

[219] *See* 532 F. Supp. at 414-15 (majority support requirement may threaten employee benefits).

[220] *See* Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 10 (D.C. Cir. 1982) (because suit in issue was by fund trustees no problem arises with prospective enforcement infringing upon employee rights).

[221] New Mexico Dist. Council of Carpenters v. Mayhew Co., 664 F.2d 215, 218 (10th Cir. 1981).

pairing employee free choice is substantial when these provisions are enforced by a minority union. Similarly, a strong presumption of coercion and diminished free choice arises when any prospective enforceability by a minority union is allowed.[222]

The case for prospective enforceability is weak. Equitable considerations that favor retrospective enforcement do not support prospective enforcement. The prospective enforcement of a prehire agreement which is void, or which has been lawfully voided, conflicts with the fundamental majoritarian principles embraced by Congress[223] and the Supreme Court.[224]

B. Equitable Considerations and Retrospective Enforcement of Obligations Incurred Prior to Repudiation

The apparent equities espoused by the District of Columbia Circuit Court contain substantial appeal. In finding the employer obligated to make welfare contributions, the court held those payments to be compensation owed.[225] The agreement specified the employer must make contributions based upon the hours worked by union and nonunion workers. Substantially all of the contribution obligations in issue arose because the employer did not contribute for the nonunion employees. Pension fund structure and eligibility requirements vary from fund to fund. The court made no determination whether employees

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[222] To justify prospective enforcement, the *Benesh & Bruns* court suggests § 301 poses "no significant risk to employee free choice." Martin v. Benesh & Bruns, Inc., 532 F. Supp. at 414. This conclusion presupposes minority union nonenforceability of hiring hall or union security provisions that clearly contemplates an adverse effect upon employees' § 7 rights. As noted, that conclusion is unwarranted. *See* Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 10 (D.C. Cir. 1982). The court carefully noted that trustee suits seeking retrospective enforcement did not impair employer or employee free choice. *Id.* The implication is that broader actions may have an adverse impact.

[223] Congress was willing to recognize lawful prehire agreements in substantial part because it recognized that in a virtually organized industry majority status will be achieved on most projects. *See* 1959 S. REP., *supra* note 38, at 28 (union will represent majority of employees eventually hired), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 424 (1959).

[224] NLRB v. Local 103, Int'l Ass'n of Bridge Workers (*Higdon*), 434 U.S. 335, 344-45 (1978).

[225] Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 9 (D.C. Cir. 1982).

could draw on the fund or create an obligation against the fund by virtue of their work as nonunion employees. As a consequence, the court's characterization of such contribution requirements as "compensation"[226] may be inappropriate. Unless there is a real probability employees could draw on the fund, they are not deprived of any compensation they have earned. Indeed, the union's welfare fund only seeks to become the fortuitous beneficiary of the work of those nonunion employees. At a minimum, a union should be required to achieve majority support before its welfare funds receive that windfall.[227]

This logic is particularly persuasive when nonunion base wage rates equal the union scale and additional wages are paid nonunion employees in lieu of pension, health, and welfare obligations. Similarly, when employer-sponsored benefits programs are afforded nonunion workers in lieu of contributions to the union fund, the earned compensation argument might well support nonenforceability since the employer and nonunion employee have specifically contracted for compensation different from that contained in the prehire agreement. The obligations between employer and employee should be governed by the meeting of the minds reached when the employee was hired. It is, therefore, clearly inappropriate to justify enforcement of prehire agreements because of employee expectations unless those expectations are real.

The Eighth, Ninth, and Tenth Circuits justify retroactive enforcement of prehire agreements by the pension fund trustees of minority unions on a slightly different basis. These courts presumed the employer had already received tangible benefits from the prehire agreement. Once an employer derived a benefit, it was reasoned, the employer should be compelled to perform its prerepudiation obligations. In each decision, however, the

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[226] *Id.* A fortiori, prospective enforcement of contributions requirements as "compensation owed" is unwarranted.

[227] A recent Ninth Circuit opinion highlights the folly of assuming enforceability of pension obligations will benefit employees. In Miranda v. Audia, 681 F.2d 1124 (9th Cir. 1982), the court found 96% of the employees for whom contributions had been made to a Laborers Union pension fund had never received pensions. 681 F.2d at 1125. Given the freedom to structure pension eligibility requirements, union funds could become insulated from claims by employees for whom benefits were not paid into the funds.

benefit allegedly received by the employer was not factually established.[228]

The Ninth Circuit did not even articulate the benefit the employer allegedly received under the agreement.[229] The Eighth Circuit assumed stability of labor costs, access to skilled hiring hall labor, and industrial peace at the work site were direct benefits flowing from prehire agreements. The court also assumed the employer had received some of those benefits. The record, however, is devoid of convincing evidence establishing any substantive benefit flowing to the employer.[230] The Tenth Circuit and several commentators have urged that industrial peace at the work site alone serves as a sufficient benefit to employers to require enforcement of prehire obligations by a minority union.[231] Assuming industrial peace, or any other benefit, may serve as consideration for quantum meruit enforcement,[232] the union should bear the burden of establishing that labor

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[228] *See infra* notes 230-31 and accompanying text.

[229] *See* Todd v. Jim McNeff, Inc., 667 F.2d 800, 801-04 (9th Cir.), *cert. granted*, 102 S. Ct. 3508 (1982).

[230] *See* Contractors' Health & Welfare Plan v. Associated Wrecking, 638 F.2d 1128, 1134 (9th Cir. 1982).

[231] *See* New Mexico Dist. Council of Carpenters v. Mayhew Co., 664 F.2d 215, 219-20 (1981) (benefit of industrial peace); Comment, *Contract Remedies, supra* note 7, at 590 (union's interest advanced by prehire agreement). "The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 454 (1957).

The NLRB has already allowed picketing beyond 30 days to force an employer to make contributions to union welfare funds in a prehire context. IUOE, Local 150, 255 N.L.R.B. 597, 602 (1981).

[232] There is serious doubt whether contract law principles like quantum meruit or estoppel are appropriate vehicles for enforcing obligations otherwise unenforceable through technical operation of the labor laws. *See e.g.*, NLRB v. Alterman Transp. Lines, 587 F.2d 212, 221 (5th Cir. 1979) ("The doctrines of traditional contract law are to a large extent inapplicable in the collective bargaining context."); American Seating Co. v. NLRB, 424 F.2d 106, 108 (5th Cir. 1970) (traditional contract principles do not govern withdrawal of tentative proposals during negotiation of labor agreement); San Antonio Mach. & Supply Corp. v. NLRB, 363 F.2d 633, 636-37 (5th Cir. 1966) (technical contract law does not necessarily make good collective bargaining law) (quoting Lozano Enters. v. NLRB, 327 F.2d 814, 818 (9th Cir. 1964)); Carpenters, Local 379 v. Day & Zimmerman, 531 F. Supp. 696, 699 (E.D. Tex. 1982) (statute of frauds does not bar enforcement of labor agreement); *cf.* NLRB v. Haberman Constr. Co., 641 F.2d 351, 355-56 (5th Cir. 1981) (not necessary to reduce labor agreement to writing; parties need only manifest intent to be bound).

peace would not have occurred in the absence of the prehire agreement.[233]

Although in each of these cases the employer may have in fact derived some benefit from its prehire agreement, the benefit derived was not established by reference to evidence in the record. If any "quantum meruit" obligation is to be imposed, the better reasoned approach would require a trial court to find obligations being incurred by the union or its welfare funds or substantial benefits flowing to the employer, or both.[234] The mere assumption that an employer has received a benefit or a union fund has incurred an obligation should not be judicially presumed. When no factual basis for a quasi-contractual obligation is established, no enforceable obligation should be judicially created.[235]

A project-by-project contractor may in fact hire no union workers for a construction project.[236] Hiring could be conducted by the employer, without resort to the union's hiring hall.[237] The

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[233] Assuming *arguendo*, that traditional contract principles are not vitiated in the labor context, it is true that quasi-contractual remedies are available for a benefit conferred when the underlying contract is unenforceable. *See* Seymore v. Reader's Digest Ass'n, Inc., 493 F. Supp. 257, 264 (S.D.N.Y. 1980) (quantum meruit recovery allowed). Recovery in these circumstances is measured in one of two ways. When it can be ascertained, the value of the benefit conferred will form the basis of recovery. But when that value is not susceptible of proof, the reasonable market value of the service rendered, regardless of its value to the defendant, is the measure of recovery. *See* Campbell v. Tennessee Valley Auth., 421 F.2d 293, 295-97 (5th Cir. 1969) (damages based on fair market value of benefit, not the reasonable value of benefit realized). The nexus is that in either case the *benefit must in fact have been conferred*, and it is the plaintiff's burden to show this. *See* Seymore v. Reader's Digest Ass'n, Inc., 493 F. Supp. 257, 264-65 (S.D.N.Y. 1980) (in quantum meruit action plaintiff must prove a benefit to defendant); Belmont Indus. v. Bechtel Corp., 425 F. Supp. 524, 526 (E.D. Pa. 1976) (to recover under quasi-contractual unjust enrichment claim, plaintiff must demonstrate defendant has actually benefited).

[234] The extent of the benefit conferred is, of course, a question for the trier of fact. *See* Hardy-Latham v. Wellons, 415 F.2d 674, 678 (4th Cir. 1968) (valuation of broker's commission).

[235] Seymore v. Reader's Digest Ass'n, Inc., 493 F. Supp. 257, 264 (S.D.N.Y. 1980) (law will presume promise to pay reasonable value of services as long as a benefit has actually been conferred); Belmont Indus., Inc. v. Bechtel Corp., 425 F. Supp. 524, 526 n.3 (E.D. Pa. 1976) (plaintiff must show defendant has actually realized benefit).

[236] *See, e.g.*, Baton Rouge Bldg. & Trades Council v. E. C. Schafer Constr. Co., 492 F. Supp. 534, 540 (M.D. La. 1980) (contractor employed no members of Laborer's union), *aff'd*, 657 F.2d 806 (5th Cir. 1981).

[237] *See, e.g.* Todd v. Jim McNeff, Inc., 667 F.2d 800, 801 (9th Cir. 1982), *cert.*

employer could provide additional wages, or its own benefits program in lieu of contributions to the union funds.[238] If the employees are lawfully informed that the work on the project will be nonunion, they voluntarily enter into work on the nonunion project. They are not, in these circumstances, enticed to perform with the expectation that the terms of the prehire agreement will apply to that project. Under these circumstances equity does not cry out for retrospective enforcement of an agreement that the employer and its employees never intended to apply to the project. Given these circumstances a prehire agreement should not be afforded retrospective *or* prospective enforcement. To do so unjustly enriches the union through involuntary imposition of the terms of the prehire agreement upon the nonconsenting employer and a majority of its employees.

On the other hand, when an employer obtains employees with union assistance, bases his bid upon guaranteed union wage rates established by the prehire agreement, or seeks insulation from lawful union picketing,[239] he receives benefits. The equitable case for retrospective enforcement in this situation is more persuasive. Summary analysis without adequate presentation of relevant facts, however, is insufficient to justify creation of enforceable obligations on the basis of fairness or any other equitable considerations.[240]

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granted, 102 S. Ct. 3508 (1982) (subcontractor's employees were not members of union until he was forced to sign prehire agreement by union and prime contractor).

[238] *See* Carpenters Amended & Restated Health Benefit Fund v. Copes & Smith, Inc., 544 F. Supp. 442, 444 (N.D. Tex. 1982) (employer paid contributions directly to some employees); 40 C.F.R. § 5.1 (1981) ("prevailing rate" that must be paid on federally financed construction projects includes fringe benefits enumerated in Davis-Bacon Act); Wage-Hour Op. 200 Assistant Wage-Hour Adm'r (1973) (specific fringe benefits included in wage determinations when payment of benefits is prevailing practice in locality). Thus, on many construction projects governed by the Davis-Bacon Act, a nonunion contractor will provide monetary compensation directly to employees in lieu of union scale fringe benefit contributions. If this contractor has executed a prehire agreement with a minority union, a court requiring the contractor to make union welfare fund contributions would be requiring double compensation for the fringe benefit portion of the "prevailing wage rate" set by the Davis-Bacon Act.

[239] Arguably, picketing or any other conduct that coerces an employer into signing a prehire agreement should taint the agreement sufficiently to make it unenforceable. *See infra* text accompanying notes 241-67 (discussion of voluntariness requirements).

[240] *Cf.* Blackburn & Co. v. Park, 357 F.2d 525, 527 (2d Cir. 1966) (no quantum meruit recovery when benefits resulted from defendant's own efforts).

Courts denying prospective enforceability need not decide the issue of the impact of union security or other contract terms on an unconsenting majority. The denial of prospective enforcement precludes that circumstance from arising. The extent to which unions may prevail in section 301 actions for prerepudiation breaches of contract provisions, other than provisions creating obligations to welfare funds, has not adequately been dealt with by the courts. The difficulty of ascertaining and proving tangible damages, a burden properly placed upon the party seeking the damages, makes it unlikely that litigation over those breaches will be extensive.

C. *Voluntary Prehire Agreements and Unlawful Coercion*

The suggestion that Congress enacted section 8(f) to foster union organizing in the construction industry[241] is incorrect[242] because the industry was already organized.[243] Congress sought to make the existing, voluntary collective bargaining practices lawful.[244] Congress risked the creation of a statutory scheme which could be abused to aid top-down organizing precisely because of the total union saturation of major construction.[245] The vast majority of construction workers were perceived by Congress to have made a lifetime section 7 choice—a choice that

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[241] *See* Note, *Empty Promises*, *supra* note 7, at 1717; *accord* Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 411-12 (N.D. Ill. 1982).

[242] *See supra* notes 50-54, 217, and accompanying text.

[243] *See* 1959 S. REP., *supra* note 38, at 27, 556-56 (substantially organized), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1959, at 423, 450-51 (1959).

[244] *See* 105 CONG. REC. 1,289 (1959) (upheld established collective bargaining), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 985 (1959).

[245] The Senate Labor and Public Welfare Committee's report on the characteristics of the industry and senate bill is instructive on this point:

> A substantial majority of the skilled employees in the industry constitute a pool of [readily referrable] such help centered about their appropriate craft union. If the employer [who enters into a prehire agreement] relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.

1959 S.REP., *supra* note 38, at 28, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 424 (1959).

transcended their employment with any particular construction industry employer.[246]

Section 8(f) constitutes a narrow exception allowing certain *voluntary* conduct, which, without section 8(f), would be an unfair labor practice.[247] The element of voluntary consent is central to the statutory purpose.[248] When parties voluntarily agree to abide by lawful agreements, no legal disputes should arise. When the parties cannot agree, the statutory scheme contemplates safeguards, including repudiation or election petitions.

Voluntary consent to be bound by prehire agreements and the existing high degree of union membership in the industry, created a reasonable assumption that majority status would accrue on virtually all covered projects as employees were hired.[249] Similarly, Congress reasonably assumed this voluntary arrange-

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[246] The Senate Committee observed that while employees work on projects of short duration, and never continuously for the same employer, thus making traditional representation proceedings unworkable, the industry was nevertheless substantially organized. 1959 S. REP., *supra* note 38, at 27, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 423 (1959). The extent of organization was an element that lead the Board to decline jurisdiction over the industry during the Wagner Act period. *Id.* Being organized, the employees already benefited from the Act's objectives. *Id.; see supra* note 223.

[247] The congressional reports and debates consistently focused on the importance of employee free choice. *See* 1959 S. REP., *supra* note 38, at 56 (no contract bar), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 452 (1959); H.R. REP. No. 1147, 86th Cong., 1st Sess. 41-42 (1959) (no contract bar; nothing in bill should be construed to permit coerced participation), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 945-46 (1959); 105 CONG. REC. 6,398-99, 6,415-16, 6,430-31, 15,541-42, 18,128 (remarks of Senator Lausche) (prehire agreements may threaten liber ties of workers); (same); (remarks of Senator Goldwater proposing amendment to ensure voluntary collective bargaining relationships); (remarks of Representative Thompson; proviso against contract bar assures democratic process); (remarks of Senator Kennedy that purpose was to permit voluntary prehire agreements), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 1,067, 1,075, 1,082, 1,578, 1,715 (1959); NLRB v. Local 103, Int'l Ass'n of Bridge Workers (*Higdon*), 434 U.S. 335, 348 n.10 (1978) ("Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into [this] narrow exception.").

[248] *See supra* note 247.

[249] 1959 S. REP., *supra* note 38, at 28, 55-56, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 424, 451-52 (1959); *see* Note, *Striking a Proper Balance*, *supra* note 7, at 1018-19 (legislative history).

ment would serve the goals of industrial peace and stability. Congress, however, did not conclude its statutory plan there. Should the threshold protections inherent in this voluntary scheme prove insufficient, Congress provided the final proviso to section 8(f) as an escape valve.[250] Under the provisio, section 8(f) agreements do not act as a contract bar to an election. The final proviso should be broadly afforded its safety valve function of ensuring labor peace and, more important, protecting employees from unlawful conduct by employers, unions, or both.[251]

The extent of enforceability of section 8(f) agreements should be guided by those underlying principles established by Congress. That scheme created specific safeguards against top-down organizing[252] and collusion between employers and unions[253] and provided affirmative protection for employee section 7 rights. The voluntary inception of such agreements is fundamental to the balanced working of this exception to the general majority rule principles of the Act. In fact, it has been urged that no element of coercion would be admitted into the narrow exception being established to the majority principle.[254] By requiring voluntary inception, labor peace and stability attendant

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[250] That proviso holds "[t]hat any agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to § 9(c) or 9(e)." 28 U.S.C. § 158(f) (1976).

[251] *See supra* notes 114-22 and accompanying text.

[252] Congressional concern for employee rights is underscored in the legislative history leading to the compromise language of the final proviso. The proviso permits resort to the Board's election procedures despite the existence of a collective bargaining agreement that, in contexts other than § 8(f), would establish a contract bar to an election.

[253] If an employer commits an unfair labor practice by recognizing a minority union in violation of § 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2) (1976), the assisted union is also considered to have committed an unfair labor practice by violating § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976), through its acceptance of exclusive bargaining status at a time when it was supported by less than a majority of employees in the unit. ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 738-40 (1961). While scienter is not a required element of the offense, *id.* at 739, employer union collusion obviously makes the case even stronger. *See* Pacific Maritime Ass'n v. NLRB, 452 F.2d 8, 10 (9th Cir. 1971) (company and union operated joint hiring hall that discriminated against non-union members).

[254] NLRB v. Local 103, Int'l Ass'n of Bridge Workers (*Higdon*), 434 U.S. 335, 348 n.10 (1978); *see* Type Rite Ribbon, 264 N.L.R.B. No. 87, 111 L.R.R.M. (BNA) 1304 (1982) (employer and union renewed collective bargaining agreement with knowledge that union did not represent majority of employees).

to consensual collective bargaining would be encouraged. Allowing an employer to void all prehire obligations should create substantial disincentives to the mob violence and physical coercion present in many union attempts to compel contractors to work union.[255] If the fruits of coercively achieved agreements were not judicially enforceable, unions would be less likely to engage in coercive conduct, and the goals of labor peace and stability would be better served. Allowing any enforcement of coercively conceived prehire agreements undercuts the balanced set of safeguards present in section 8(f).

The Ninth Circuit rejected the employer's coercion defense in *Todd v. Jim McNeff, Inc.*,[256] a section 301 action by the trustees of the union's fringe benefit plans to collect contributions owed under the terms of a prehire agreement.[257] McNeff signed the prehire agreement only after he was told by both a union representative and the prime contractor that he would have to sign the Union's Master Labor Agreement or "leave the job."[258]

The *McNeff* court reasoned that even a coercively conceived agreement must be repudiated before coercion can be set up as a defense to obligations under the agreement.[259] The court found that a lesser standard would allow an employer to reap benefits from the agreement while not performing on its corresponding

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[255] *See* Scott v. Moore, 680 F.2d 979, 1002-04 (5th Cir. 1982) (union conspiracy to intimidate and coerce nonunion workers), *cert. granted*, 51 U.S.L.W. 3404 (U.S. Nov. 30, 1982) (No. 82-846); H. REP. No. 1147, 86th Cong., 1st Sess. 42 (1959) (force, coercion, strikes, or picketing cannot be used to instigate a prehire agreement), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 946 (1959).

[256] 667 F.2d 800 (9th Cir.), *cert. granted*, 102 S. Ct. 3508 (1982).

[257] 667 F.2d at 804.

[258] *Id.* at 801.

[259] *Id.* As a general proposition, a contract entered into under duress is voidable. *See* Diffenderfer v. Heublein, Inc., 412 F.2d 184, 187 (8th Cir. 1968). Because such a contract is merely voidable, it may be ratified when the party who entered into the contract while under duress subsequently accepts benefits or acquiesces in the contract after he has had a chance to void it. *See* Boyle v. North Atl. Coal Co., 331 F. Supp. 1107, 1109 (W.D. Pa. 1971) (assuming threat of strike could be considered duress, defendant ratified promissory note by making royalty payments). But ratification cannot occur when "the duress that originally induced the contract has continued to operate." 412 F.2d at 187-88. *See generally* 13 S. WILLISTON, WILLISTON ON CONTRACTS § 1624 (3d ed. 1970) (duress and voidability of agreements).

obligations. As noted previously, the bald assumption that an employer may receive benefits is an inappropriate standard by which to test enforceability.[260] The party claiming enforceability should be required to prove the existence of facts constituting benefits conferred before any obligations are enforced. To require a lesser standard creates an irrebuttable judicial presumption of benefit when conceivably none exists. That irrebuttable presumption also bars employer litigation of his allegations of coercion and is an insufficient justification for quasi-contractual recovery on otherwise void obligations.

The case for enforceability of agreements that are coercively conceived is very weak. The trustees claiming enforceability in *McNeff* sought to benefit from the union's unlawful coercion. Equitable quasi-contractual remedies should not be judicially invoked to enforce coercively created obligations.[261] Thus, McNeff should have been afforded the opportunity to establish coercion, which, if established, would bar prerepudiation enforceability.[262]

Disallowance of the coercion defense interjects a nonconsensual element into the balanced congressional scheme established by section 8(f) and reduces the safeguards that were intended to protect the employees' section 7 rights. Voluntary acquiesence by an employer cannot serve as a factor in protecting employees' section 7 choice when agreements are entered into on account of coercion or picketing.[263] The absence of this safeguard is sufficiently important to deny enforcement to coercive agreements. Only a denial of enforcement will create sufficient disincentives to encourage unions or employers to avoid tactics that otherwise

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[260] *See supra* notes 230-41.

[261] Unlawful coercion should be grounds for refusing enforcement. *See* Kaiser Steel Corp. v. Mullins, 102 S. Ct. 851, 856, 860 (1982) (affirmative defense); Carpenters Amended & Restated Health Benefit Fund v. Copes & Smith, Inc., 544 F. Supp. 442, 450 (N.D. Tex. 1982) (denial of enforcement not inequitable because employer was coerced into signing prehire agreement).

[262] *See id.* at 860. At the very least, a party claiming coercion should be afforded the opportunity to show the coercive conduct continued through the period for which enforcement is sought. As stated by the Eighth Circuit in Diffenderfer v. Heublein, Inc., 412 F.2d 184, 187-88 (8th Cir. 1968), it is a "well known doctrine that where duress continues throughout the performance, there can be no ratification."

[263] NLRB v. Local 103, Int'l Ass'n of Bridge Workers, (*Higdon*) 434 U.S. 335, 341 (1978).

cannot be uncovered, prevented, or corrected.

To create fully binding obligations employers and unions need only secure a work force in which majority status is achieved. That burden is not substantial. An employer may actively support the union's organizing efforts in a number of lawful noncoercive ways.[264] A union may encourage its members to apply with the employer or seek to recruit any workers the employer has hired.[265] During the union's organizing efforts an employer is not free to ensure a lack of majority status through discriminatory hiring practices.[266] Making hiring decisions based upon union membership is an unfair labor practice. Since the remedy for such unlawful practices would be back pay and an offer of employment to those discriminated against, the issue of majority status should only be determined after the work force has been purged of the effects of the discriminatory hiring practices.[267] Given the above, it is not logical to allow coercion as a tool to obtain binding prehire agreements.

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[264] *See* Coamo Knitting Mills, Inc., 150 N.L.R.B. 579, 580-81, 588-89 (1964) (employer delivered speech to employees praising union and urging employees to join, but made no promise of benefits to induce them to join or threats to coerce joining; attended union meeting at which employees signed authorization cards; permitted union to hold meeting at end of workday on company property; allowed union to use company property for election and meeting of shop committee, but only after a majority of employees had already joined union; employer was not aware of organization activities of any other union).

[265] In theory, the union should operate a hiring hall that does not discriminate in referrals on the basis of union membership. *See, e.g.*, J.J. Hagerty, Inc., 139 N.L.R.B. 633, 638-39 & n.5 (1962), *enforced in part* 321 F.2d 130 (2d Cir. 1963). As a practical matter, employees hired out of the hall would be far more likely to support the union. *See supra* note 140 and accompanying text.

[266] *See* 29 U.S.C. § 158(a)(3) (1976) (unfair labor practice to encourage or discourage membership in union by discriminating in regard to hire or tenure); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 182-85 (1941) (refused to hire union affiliated employees); Dee Cee Floor Covering, Inc., 232 N.L.R.B. 421, 422 (1977) (administrative law judge held employer committed unfair labor practice when it refused to hire union members pursuant to prehire agreements; Board reversed on basis that prehire agreement was unenforceable because union had never achieved majority status at project).

[267] *Cf.* El Fenix Corp., 234 N.L.R.B. 1212, 1214-15 (1978) (discriminatorily discharged employees entitled to vote in representation election); Bonanno Family Foods, Inc., 230 N.L.R.B. 555, 556 (1977) (same).

D. *Kaiser:* Is Illegality a Necessary Ingredient in Nonenforceability?

The Eleventh Circuit in *Laborers District Council v. McDowell Contractors, Inc.*[268] concluded that provisions in prehire agreements requiring employer contributions to union pension funds were unenforceable if the prehire agreement was unenforceable by reason of the union's minority status.[269] In contrast, the District of Columbia Circuit narrowly read *Kaiser* to bar enforceability only if the obligation sued upon was based upon an illegal agreement.[270] The issue in *Kaiser* was not whether enforceable obligations had been created through collective bargaining. A contract admittedly existed.[271] The employer sought relief from a contributions provision on the basis that it violated section 8(e) or the antitrust laws.[272] But for this illegality, there was no doubt that a binding collective bargaining agreement had been consummated between the employer and its employees' certified bargaining representative.[273] The certified bargaining representative had obtained majority status and enjoyed a section 9 presumption of continuing majority status. *Kaiser* contrasts markedly from the section 8(f) context when the issue is whether any effect should be given to inchoate promises.

Notwithstanding the above, there is at least one argument

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[268] 680 F.2d 94 (11th Cir. 1982).

[269] *Id.* at 95-96.

[270] Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 4 (D.C. Cir. 1982). The D.C. Circuit's characterization of prehire agreements with minority unions as lawful begs the question. Without § 8(f), these agreements violate § 8(a)(2) and § 8(b)(1)(A). ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 738-40 (1961). A minority union seeking to compel enforcement of a prehire agreement interjects a coercive element into the voluntary process. That coercion, in the absence of majority support, serves to violate the protective principles underlying *Bernhard-Altmann* and the balanced safeguards to § 8(f). *See supra* notes 241-69 and accompanying text.

Coercively conceived prehire agreements provide a stronger fact context for concluding illegality has occurred, which taints the agreement. Thus, a minority union that engages in lawful picketing under § 8(b)(7)(c) or unlawful coercion of employers or employees, would be seeking enforcement of obligations arising under a prehire agreement whose conception is tainted by the union's own unlawful conduct. *See supra* notes 241-69 and accompanying text.

[271] 102 S. Ct. at 854-55.

[272] *Id.* at 856.

[273] *Id.* at 854-55.

that trustee-sought enforcement of contributions is unlawful. In relevant parts, section 302(a)[274] of the LMRA prohibits employers or anyone acting in their "interest" from paying or lending "any money or other thing of value" to any labor organization.[275] Section 302(c)(5) exempts from this prohibition contributions to a trust fund "established . . . for the sole and exclusive benefit of the employees of such employer."[276] This exemption, however, is limited to health, welfare, and pension funds established by written agreements.[277] To avoid the prohibition of section 302(a), union contracts containing pension health and welfare contribution clauses must be clearly set out in a written agreement.[278] Repudiated prehire agreements should not be sufficient to trigger the section 302(c)(5) exception because they are not written agreements for purposes of section 302(c). Even assuming that before repudiation a prehire agreement is a written agreement for the purposes of enforcement of involuntary contributions, clearly no written agreement exists *after* an employer lawfully repudiates the prehire agreement.[279] The written agreement requirement, therefore, is not met, and obligations allegedly owed under the agreement could not be paid without violat-

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[274] 29 U.S.C. § 186 (1976).

[275] *Id.* § 186(c)(5)(1978).

[276] *Id.* § 186(c)(5)(A)-(B)(1978).

[277] *Id.*

[278] *See, e.g.*, Bricklayer's Union, Local 15 v. Stuart Plastering Co., 512 F.2d 1017, 1028-29 (5th Cir. 1975) (employer not bound to make payments in absence of statutory compliance).

[279] In Peerless Roofing Co. v. NLRB, 641 F.2d 734, 736 (9th Cir. 1982), the Ninth Circuit held an expired collective bargaining agreement was sufficient to satisfy the written agreement requirement of § 302 because, during the contract negotiations following expiration of a collective bargaining agreement, the employer was required "to maintain the status quo as to wages and working conditions." *Id.* Once the parties reach impassse; however, there is no further duty to bargain and the obligation to continue making contributions lapses. Producer's Dairy Delivery v. Western Conference, 654 F.2d 624, 627-28 (9th Cir. 1981). *Peerless Roofing's* analysis must be distinguished from the case in which a prehire agreement is void and clearly no obligation to maintain the status quo exists. Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 8 (D.C. Cir. 1982); Todd v. Jim McNeff, Inc., 667 F.2d 800, 802-03 (9th Cir.), *cert. granted*, 102 S. Ct. 3508 (1982); Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 809-13 (5th Cir. 1981); W.C. James, Inc. v. Oil Chem. & Atomic Workers Int'l Union, 646 F.2d 1292, 1294-95 (8th Cir. 1981). *Contra* New Mexico Dist. Council v. Mayhew Co., 664 F.2d 215, 220 (10th Cir. 1981) (employer must honor agreement).

ing section 302.[280] An attempt to enforce contributions by a minority union in this context may constitute an unfair labor practice.[281] Voluntary payments made after repudiation similarly may constitute not only an unfair labor practice, but also a criminal violation of section 302.[282]

Under this logic, obligations arising by virtue of the prehire agreement prior to repudiation could not be enforced through a section 301 suit when the employer repudiates the agreement before enforcement is sought. In this instance the written agreement is a nullity before the suit is filed because the voiding of a voidable contract creates a nullity.

VII. Conclusion

Commentary favoring enforceability of prehire agreements by minority unions characterize national labor policies as serving the primary goals of industrial peace and equalization of bargaining clout.[283] Preservation of employee free choice of a bargaining representative is cast aside as an unworthy goal of labor legislation when it is presumed to undercut these other goals.[284] It is precisely these majoritarian principles that are necessary components of labor stability and enhanced bargaining clout.[285] Concepts of majority rule and democratic processes have been cited as substantial contributing factors to industrial peace.[286]

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[280] *See* Moglia v. Geoghean, 403 F.2d 110, 117-19 (2nd Cir. 1968) (trust benefits could not be paid), *cert. denied*, 394 U.S. 919 (1969). *But see* Burke v. French, 687 F.2d 307, 310-12, 111 L.R.R.M. 2635 (9th Cir. 1982) (§ 302(c)(5) defects no defense to contributions obligations).

[281] *See* Kaiser Steel Corp. v. Mullins, 102 S. Ct. 851, 856 (1982).

[282] *See* Culinary Workers & Bartenders Union No. 596 Health and Welfare Trust v. Gateway Cafe, Inc., 95 Wash. 2d 791, 630 P.2d 1348, 1351 (1981).

[283] *See, e.g.*, Note, *Empty Promise, supra* note 7, at 1716-17.

[284] *Id.*

[285] The Supreme Court made it clear in *Higdon* that the principle of majority rule is firmly rooted in national labor relations policy. NLRB v. Local 103, Int'l Ass'n of Brige Workers (*Higdon*), 434 U.S. 335, 344-45 (1978). Moreover, bargaining clout is clearly diminished in a divided work force. *See, e.g.*, NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720, 725-27 (5th Cir. 1978) (company legally withdrew favorable proposals and engaged in hard bargaining when group of strikers crossed picket line and returned to work).

[286] *See, e.g.*, NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720, 725-27 (5th Cir. 1978) (company justifiably withdrew recognition from a divided union).

More cohesive employee groups can better exercise economic leverage upon an employer because they possess more bargaining clout.[287] Top-down imposition of a minority bargaining representative does little to contribute to these goals.

It is precisely this concern for the fundamental principles of majority rule that leads the Fifth, Eighth, Ninth, Eleventh, and District of Columbia Circuits to refuse prospective enforcement of any prehire obligation by a minority union in either unfair labor practice proceedings or section 301 actions.[288] Forcing a representative upon a nonconsenting minority is unlikely to contribute to the goals of labor stability and industrial peace. The unions have vast abilities to recruit support by showing employees precisely what terms and conditions would apply if the prehire agreements were enforceable through achievement of majority status. A union should achieve majority status when employees want it, given the union's inherent powers of persuasion in an industry with a rich history of unionization and the relatively insubstantial burden of establishing majority support.

Dire predictions of labor unrest and instability seem exaggerated. Stability, of course, is secured by the fact that voluntary compliance between an employer and a union will not become the subject of dispute. Assuming that labor unrest is to occur, it is far more likely that it will result from a minority union acting as a bargaining representative. For example, when a minority union attempts to enforce a union security clause against a non-consenting majority, labor unrest is likely. Additionally, when a minority union becomes too reliant upon the employer's voluntary goodwill its ability to maintain its status as a credible bargaining representative is threatened. Such a posture compromises the union and dilutes worker bargaining

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[287] Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 7-9 (D.C. Cir. 1982); Laborers Dist. Council v. McDowell Contractors, Inc., 680 F.2d 94, 95 (11th Cir. 1982); Todd v. Jim McNeff, Inc., 667 F.2d 800, 802-03 (9th Cir.), *cert. granted*, 102 S. Ct. 3508 (1982); Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co., 657 F.2d 806, 809-13 (5th Cir. 1981); W.C. James, Inc. v. Oil Chem. & Atomic Workers Int'l Union, 646 F.2d 1292, 1294-95 & n.4 (8th Cir. 1981).

[288] *See* Scott v. Moore, 680 F.2d 979, 982-84 (5th Cir. 1982) (en banc) (union members engaged in violence to coerce construction company's employees to join union), *cert. granted*, 51 U.S.L.W. 3404 (U.S. Nov. 30, 1982) (No. 82-486).

power. Avoidance of this type of relationship is precisely what section 8(a)(2) was intended to accomplish.[289]

Some commentators have suggested disruption caused by the hiring of nonunion workers justifies minority union enforcement of agreements. This argument wholly ignores the nonunion workers' section 7 rights and condones otherwise unlawful practices. Courts have not yet bolstered the rights of unions at the expense of the section 7 rights of nonunion employees to this extent. The Supreme Court should not do this when it decides the *McNeff* case. [290]

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[289] *See, e.g.*, Hotpoint Div., G.E. Co., 128 N.L.R.B. 788, 792 (1960) (purpose of § 8(a)(2) was to prevent unions from becoming too reliant upon the employer's good will thus impeding its ability to effectively represent employees).

[290] Todd v. Jim McNeff, Inc., 667 F.2d 800 (9th Cir.), *cert. granted*, 102 S. Ct. 3508 (1982).

THE OFFENSIVE USE OF COLLATERAL ESTOPPEL IN MASS TORT CASES

*Douglas J. Gunn**

INTRODUCTION

There are presently pending in federal and state courts over 16,000 asbestos-related lawsuits,[1] over 1,500 "Dalkon Shield" cases,[2] at least 1,000 DES cases,[3] nearly 1,000 cases alleging separate design defects against two car manufacturers,[4] over 500

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[1] Winter, *LawScope*, 68 A.B.A. J. 397, 397 (April 1982). It is estimated that 400 to 500 additional suits seeking damages for exposure to asbestos products are filed each month. *Id.* As primary support for its decision to seek refuge under Chapter 11 of the Federal Bankruptcy Code on August 26, 1982, the Manville Corporation, the leading producer of asbestos products, made note of a recently-concluded study that estimated 52,000 asbestos-related lawsuits may be filed against the company. *See* Epidemiology Resources, Inc., *Projections of Asbestos-Related Disease 1980-2009* (August 2, 1982), *reprinted in* Asbestos Litigation Reporter 5584-5598 (September 24, 1982).

[2] The "Dalkon Shield" is an intrauterine device that was used by approximately 2,200,000 American women from 1970 to 1974. A large number of the women suffered adverse reactions to the device and are seeking to recover from various manufacturers on theories of negligence, strict liability, breach of warranty, conspiracy, and fraud. *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litigation, 526 F. Supp. 887, 892-93 (N.D. Cal. 1981).

[3] Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982). Diethylstilbestrol (DES) is a man-made estrogen designed for pregnant women and is estimated to have been taken by over 500,000 women. A statistical link has been found between DES and the incidence of cancer in the daughters of DES users. *See* Comment, *The DES Dilemma: An Analysis of Recent Decisions*, 52 MISS. L.J. 199, 200 nn.6 & 8 (1982).

[4] Approximately 700 suits have been filed against Ford Motor Company by plaintiffs alleging that certain Ford vehicles moved from park to reverse gear without warning when transmissions failed to hold or engage properly. An independent study indicates a minimum of 1400 additional suits alleging the same defect should be expected over the next eight years. Sylvester, *$280 M Legal Bill for a 'Better Idea'?*, Nat'l L.J., Sept. 27, 1982, at 18, col. 2.

Nearly 200 suits have been filed against Jeep Corporation and its parent, American Motors Corporation, related to the Jeep CJ-5 model, alleging that the manufacturer has failed to correct defects and to warn against the vehicle's tendency to roll over. Granelli,

cases stemming from exposure to formaldehyde foam insulation,[5] several hundred Agent Orange lawsuits,[6] and hundreds of other cases involving exposure to various chemical products.[7] In addition, scores of cases have been filed by plaintiffs who were injured or had relatives that were killed in plane, train, or bus accidents. While the plaintiffs in some of these mass tort cases have united in filing class actions in order to achieve a uniform and, hopefully, expedited disposition of their claims,[8] many others have not or have been precluded from doing so.[9] The

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Settling for Secrecy?, Nat'l L.J., May 24, 1982, at 1, col. 1.

In a related field, numerous cases are underway against Firestone alleging defects in its steel belted radial tires and seeking damages for death, injury, or damage as a result of tire failure. In Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595 (S.D.N.Y. 1982), the district court refused to certify a class of all individuals, numbering in the millions, who owned Firestone tires during specific years for purposes of a class action under FED. R. CIV. P. 23. 535 F. Supp. at 608.

[5] Formaldehyde foam insulation was banned by the United States Consumer Product Safety Commission as a health hazard in March, 1982. At least three awards in excess of $500,000 have been rendered in cases involving formaldehyde exposure in mobile homes. Ranii, *Punitive Damages Given in Formaldehyde Verdict*, Nat'l L.J., Sept. 20, 1982, at 7, col. 1.

[6] One hundred and sixty-seven suits involving over 3,400 plaintiffs have been filed in the Eastern District of New York alone. *In Re* Agent Orange Prods. Liab. Litigation, 506 F. Supp. 762, 783 (E.D.N.Y. 1980). Plaintiffs have alleged that approximately 2,400,000 American servicemen were exposed to contaminated herbicides, including Agent Orange, containing the toxic agent, dioxin, during their stay in Vietnam. Ryan v. Cleland, 531 F. Supp. 724, 727 (E.D.N.Y. 1982).

[7] Other toxic chemicals that will likely spawn massive litigation once exposure is more directly tied to health-related problems include benzene, vinyl chloride, and polychlorinated biphenyl (PCB). Marbach, *Toxic Time Bombs*, NEWSWEEK, September 6, 1982, at 57.

While the focus of this article is on the types of mass tort situations listed above, the principles of law outlined are applicable to almost any situation involving three or more parties. *See, e.g.*, Oldham v. Pritchett, 599 F.2d 274, 278-81 (8th Cir. 1979) (motorboat accident); Willis v. Fournier, 418 F. Supp. 265, 266-67 (M.D. Ga.) (automobile collision), *aff'd mem.*, 537 F.2d 1142 (5th Cir. 1976).

[8] *See, e.g., In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litigation, 526 F. Supp. 887, 896 (N.D. Cal. 1981); *In re* Agent Orange Prods. Liab. Litigation, 506 F. Supp. 762, 785 (E.D.N.Y. 1980); Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 109 Cal. Rptr. 254, 257 (1973) (recognizing availability of class action remedy).

[9] Numerous authorities indicate that product liability suits are not appropriate subjects for class actions. *See, e.g.*, City of Chicago v. General Motors Corp., 332 F. Supp. 285, 288 (N.D. Ill. 1971), *aff'd* 467 F.2d 1262 (7th Cir. 1972); Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 570-72 (E.D. Tex. 1974). *See generally* Note, *Mass Accident Class Action*, 60 CAL. L. REV. 1615, 1638 (1972) (discussing availability of class certification to mass tort plaintiffs). Some problems associated with mass tort class actions were summarized

case-by-case disposition of these often complicated and time-consuming lawsuits threatens to overwhelm an already burdened judiciary and to delay and to disrupt the resolution of more traditional suits. Thus, many have sought to curtail and even preclude litigation on matters common to other cases that have already been judicially determined. The traditional procedural doctrine of collateral estoppel is viewed in the area of mass tort litigation as a primary means of achieving this goal. But, in the effort to promote judicial economy and to ensure the swift determination of mass tort cases, the danger that some parties may be deprived of a full and fair opportunity to have their day in court has increased dramatically. This increased danger results primarily from the potential for offensive use of collateral estoppel by plaintiffs. Offensive collateral estoppel occurs when a defendant is barred from relitigating an issue decided against him or his representative in an earlier action involving a different plaintiff. This article will consider the application of this principle to mass tort cases in which multiple plaintiffs seek to preclude common defendants from relitigating issues of liability. Because a proper understanding of the subject area requires some familiarity with both the history and current status of the doctrine of collateral estoppel, the mass tort discussion will be preceded by four introductory sections.

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as follows:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Proposed Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966).

The certification of a class in a mass tort case does not end the potential for duplicitous litigation, however, still to be resolved is the collateral estoppel effect of the class action suit on class members who chose to "opt-out" as well as on those individuals whose claims arose after the resolution of the original action. If the representative or members of the class are determined not to have represented the interests of these nonclass members, an adverse prior judgment cannot bind the nonmembers because they have not yet had their day in court. *See* Grigsby v. North Miss. Medical Center, Inc., 586 F.2d 457, 461 (5th Cir. 1978). Similarly, in a jurisdiction that still adheres to the mutuality requirement, a plaintiff cannot invoke the benefits of a prior judgment in favor of class members with whom he was not in privity. *See infra* text accompanying notes 16-18.

I. COLLATERAL ESTOPPEL AND THE MUTUALITY REQUIREMENT

The doctrines of collateral estoppel and res judicata, though distinct legal principles, are often mistakenly used interchangeably. When a plaintiff sues in tort and loses, he is prohibited from again seeking recovery from the same defendant on the same cause of action. Res judicata bars relitigation of the same *cause of action* by the parties involved in a prior case, or their privies, when a court of competent jurisdiction has previously issued a final judgment on the merits.[10] Res judicata is thus often referred to as "claim preclusion." Collateral estoppel bars relitigation of an *issue* or *fact* by parties to the prior action, or their privies, when a prior court has necessarily decided the issue in a final adjudication on the merits.[11] Collateral estoppel is therefore known as "issue preclusion." The operation of collateral estoppel depends upon the actual litigation of a specific factual issue that was essential[12] to the judgment in a prior suit, regardless of the identity of the cause of action asserted.[13]

Res judicata is nondiscretionary in nature because without it the judgment lacks conclusiveness and essential finality.[14] The application of collateral estoppel is discretionary in nature because it primarily serves to promote judicial economy, an important but nonessential commodity.[15] Thus, while collateral estop-

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[10] *See* Palmer v. Clarksdale Hosp., 213 Miss. 611, 616, 57 So.2d 476, 478 (1952).

[11] Bush Constr. Co. v. Walters, 254 Miss. 266, 272-73, 179 So.2d 188, 190 (1965). The requirements for the applicability of the doctrine of collateral estoppel have been set forth by the Mississippi Supreme Court in Garraway v. Retail Credit Co., 244 Miss. 376, 384-85, 141 So.2d 727, 730 (1962) and in Ditta v. City of Clinton, 391 So.2d 627, 629 (Miss. 1980) and, using similar criteria, by the Fifth Circuit in Johnson v. United States, 576 F.2d 606, 613-15 (5th Cir. 1978) and in Rufenacht v. Iowa Beef Processors, Inc., 656 F.2d 198, 202 (5th Cir. 1981).

[12] *See* Consumer Prod. Safety Comm'n v. Anaconda Co., 593 F.2d 1314, 1322 (D.C. Cir. 1979) (holding on specific issue in prior case unnecessary dicta and not basis for estoppel); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); cases cited in note 11 *supra*. *But cf.* Ezagui v. Dow Chem. Corp., 598 F.2d 727, 733 (2d Cir. 1979) (alternative holding in prior case adequate ground for estoppel).

[13] Solar Kinetics Corp. v. Joseph T. Ryerson & Son, Inc., 488 F. Supp. 1237, 1243 (D. Conn. 1980); Grossman v. Axelrod, 466 F. Supp. 770, 774-76 (S.D.N.Y. 1979); United Fed'n of Teachers Welfare Fund v. Kramarsky, 451 F. Supp. 333, 336-37 (S.D.N.Y. 1978).

[14] James v. Gerber Prods. Co., 587 F.2d 324, 327 (6th Cir. 1978).

[15] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

pel is sometimes regarded merely as a subspecies of res judicata, the fact that identity of claims and, in some jurisdictions, identity of parties is not required serves to broaden the scope of collateral estoppel beyond that of res judicata.

As seen in the preceding definition of collateral estoppel, the doctrine traditionally has required that the parties to the second action be the same as, or in privity with,[16] the parties to the first action in order for the doctrine to be applicable. This requirement, which operates to prevent one who was not bound by a prior adjudication from benefiting from that adjudication, is known as the rule of mutuality. Because only parties or their privies could have been bound by a prior adjudication if they had lost, mutuality requires that only they may benefit from such adjudication. Thus, mutuality serves to supplement the requirements of due process. In general, due process prevents a judgment from *binding* one who was not a party or in privity with a party to the suit in which it was rendered.[17] There is, however, no due process requirement, as such, that one must have been a party in order to invoke the *benefits* of a prior judgment. This is the province of mutuality.[18] The following examples will illustrate the operation of the mutuality requirement:

(1) First Action: Plaintiff v. Defendant—Judgment for Plaintiff.
Second Action: Plaintiff v. *X*—because *X* was neither a party nor in privity with a party to the first action, due process prohibits use of the prior judgment in the action against *X*.

(2) First Action: Plaintiff v. Defendant—Judgment for Defendant.
Second Action: Plaintiff v. *X* —*X* wants to use the

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[16] *See infra* notes 138-147 and accompanying text. The question of whether privity exists is ordinarily one of fact that requires an examination of the circumstances of each individual case. Crane Boom Life Guard Co. v. Saf-T-Boom Corp., 362 F.2d 317, 322 (8th Cir. 1966).

[17] Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 320-28 (1971); Hansberry v. Lee, 311 U.S. 32, 40-41 (1940).

[18] *See* Pennington v. Snow, 471 P.2d 370, 376-78 (Alaska 1970) (mutuality will not be required as rule); Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 241-42 (1954).

prior judgment against Plaintiff as a defense. Mutuality prevents *X* from using the prior judgment because *X* would not have been bound if the judgment in the first action had been for Plaintiff.

(3) First Action: Plaintiff v. Defendant—Judgment for Plaintiff.
Second Action: *X* v. Defendant—*X* wants to use the prior judgment against Defendant to preclude Defendant from relitigating an issue previously decided against him. Mutuality prohibits *X* from seeking to benefit from an earlier action to which *X* was not a party.

The restrictive nature of the mutuality requirement is apparent. The rule prohibits both defensive and offensive use of collateral estoppel by a nonparty. Defensive use, as in example (2) above, occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.[19] Offensive use of collateral estoppel, as in example (3) above, occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.[20]

Support for the mutuality rule usually centers around the concept of fairness: to allow a person to reap the benefits of a personal judgment to which he was not a party is thought to be unfair.[21] Other arguments in favor of mutuality include the in-

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[19] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979). In jurisdictions that have abolished the mutuality requirement, defensive use can arise in two situations: (1) when an unsuccessful plaintiff thereafter brings suit against a separate defendant, and (2) when a plaintiff in privity with an unsuccessful prior plaintiff brings suit against either the prevailing defendant in the prior action or a separate defendant.

[20] *Id.* Offensive use can arise in two situations: (1) when a separate plaintiff brings suit against an unsuccessful prior defendant, *see, e.g.*, Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111, 114 (1958) (negligence claim by parents of child in auto accident after liability established in child's action), and (2) when the prevailing plaintiff or a separate plaintiff brings suit against a defendant in privity with a prior unsuccessful defendant, *see, e.g.*, Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 339 (5th Cir. 1982) (asbestos defendants not collaterally estopped because not in privity with prior defendants).

[21] *See, e.g.*, Overton, *The Restatement of Judgments, Collateral Estoppel, and Con-*

herently personal nature of an in personam judgment,[22] the fallibility of the jury system,[23] the danger of plaintiffs who evoke sympathy,[24] compromise verdicts,[25] incompetency of counsel in the previous action,[26] and newly discovered evidence.[27]

During the past forty years a number of jurisdictions have

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flict of Laws, 44 TENN. L. REV. 927 (1977). One author has asked: "Would it not always be unfair to bind an unsuccessful defendant, who had no choice but to defend the action brought by A, in a later litigation with B, once it is conceded that the losing party might well have won both cases if the sequence had been reversed?" *Id.* at 935.

Despite the widespread assault on the mutuality requirement in the past few decades, a number of commentators have defended the rule and have urged its retention. *See, e.g.*, Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1, 18-19 (1969); Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612, 679 (1978).

[22] *See* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TULANE L. REV. 301, 330 (1961) (mutuality restricts an in personam judgment to its proper sphere).

[23] Despite its decision to approve nonmutuality, the court in Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968) made the following observation:

> The selection of the judge and jury, the choice of counsel, the availability of witnesses, the manner of presentation of their testimony, the dynamics of the rapport between witnesses and fact-finder, and the personalities and appearances of the parties as they impress the fact-finder in various ways, are all matters that defy scientific analysis, are affected by fortuitous circumstances and variously determine the outcome of a contest conducted in the courts of this country.

Id. at 286, 445 P.2d at 562.

[24] *See* Hicks v. Quaker Oats Co., 662 F.2d 1158, 1172 (5th Cir. 1981). In *Hicks*, this consideration was one reason the Fifth Circuit refused to permit offensive use of collateral estoppel. *Cf.* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 322 (1957) (mutuality produced sound results). Professor Currie later withdrew his objections to nonmutuality. *See* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 27-28 (1965). His original article, however, remains persuasive with those who defend the mutuality requirement.

[25] *See* Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532, 540-41 (2d Cir. 1965) (doctrine not applied because of small award in previous case); 65 MINN. L. REV. 983, 988-92 (1981) (collateral estoppel not applied when there is a jury compromise); *see also* Katz v. Eli Lilly & Co., 84 F.R.D. 378, 382 (E.D.N.Y. 1979) (jurors deposed in prior action to determine if verdict represented compromise).

[26] *See* Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329, 339 (1960) (issue of contractor's performance precluded by holding in previous action). In this case, the court recognized "that there may be numerous reasons why it would be easier for B to defeat X, than for him to defeat A," and listed the agreeable personality of the client and the inadequacy of the attorney as examples. *Id.* at 9, 474 P.2d at 333. The court held, however, that these factors were not relevant to the issue of whether or not to abandon mutuality. *Id.* at 11, 474 P.2d at 334.

[27] *See* United States v. United Air Lines, Inc., 216 F. Supp. 709, 720-25 (D. Nev. 1962).

abandoned the mutuality requirement despite these arguments. The movement began in 1942 with the case of *Bernhard v. Bank of American National Trust & Savings Association.*[28] Writing for a unanimous California Supreme Court, Justice Traynor analyzed the rule of mutuality and found no basis in reason for prohibiting a nonparty defendant from estopping a plaintiff who had lost the same issue in a prior suit.[29]

After *Bernhard,* the rule of mutuality was subjected to intense scrutiny in courts across the United States. Spurred on by the concept of judicial economy and unconvinced of the unfairness to a defendant who has had his day in court on the issue in question, a number of state courts followed *Bernhard* and removed the requirement of mutuality to permit defensive use of collateral estoppel.[30] Although a substantial minority of states still require mutuality, it appears that a majority of jurisdictions have dispensed with the rule.[31] The United States Supreme Court placed its imprimatur on the idea of nonmutuality in 1971 when it ruled in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[32] that the defensive use of collateral estoppel was permissible in the patent case before it. The Court stated that "uncritical acceptance of the principle of mutuality . . . is today out of place"[33] and questioned "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue."[34] The protection afforded the estopped party by limiting estoppel rights to identical parties was thus replaced by the safeguard of requiring that the estopped party have a full and fair opportunity to

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[28] 19 Cal. 2d 807, 122 P.2d 892 (1942).

[29] *Id.* at 812, 122 P.2d at 895.

[30] A list of state courts that have abandoned the mutuality requirement is found in Note, *Nonmutuality: Taking the Fairness out of Collateral Estoppel,* 13 IND. L. REV. 563, 567 n.23 (1980). *See also* Annot., 31 A.L.R. 3d 1044, 1067-72 (1970 & Supp. 1981) (compilation of cases and materials on the abrogation of the mutuality requirement).

[31] The second Restatement of Judgments states that the *Bernhard* doctrine has achieved general acceptance. RESTATEMENT (SECOND) OF JUDGMENTS § 29, reporter's note at 298 (1982). *But see* Overton, *supra* note 21, at 935-37 (challenging the Restatement position). *See also* Annot., *supra* note 30.

[32] 402 U.S. 313 (1971).

[33] *Id.* at 350.

[34] *Id.* at 328.

litigate the issues.[35]

Despite the significant number of decisions permitting defensive use of collateral estoppel, most courts have remained reluctant, for reasons to be examined in part V, to abandon mutuality in cases involving offensive use. In general, cases of offensive collateral estoppel raise more pressing questions about whether the prior suit afforded the estopped party (the defendant) a sufficiently fair opportunity to litigate. Fully cognizant of the potential unfairness involved with offensive use, the United States Supreme Court nonetheless decided to permit offensive estoppel under certain circumstances in its 1979 decision in *Parklane Hosiery Co. v. Shore*.[36] The Court promulgated a two-part test designed to foster judicial economy and consistency of judgments and to assure that the rights of a defendant are adequately protected. The Court stated, "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[37] Before discussing the application of this test to a situation involving multiple plaintiffs asserting actions arising out of a common fact situation, this article will briefly examine the state of the law of collateral estoppel in both Mississippi and the Fifth Circuit, as well as the extent to which a federal court is required to apply the state rules of collateral estoppel.

II. The Mutuality Requirement in Mississippi

The development and explication of the doctrines of collateral estoppel and res judicata have a long history in Mississippi law. In a series of early cases extending over a number of years,[38]

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[35] *Id.* at 329.

[36] 439 U.S. 322 (1979).

[37] *Id.* at 331.

[38] *See* Duett v. Pine Mfg. Co., 209 Miss. 830, 845-46, 48 So. 2d 490, 496 (1950) (full payment of judgment precluded further action by plaintiff to recover additional damages); Townsend v. Beavers, 185 Miss. 312, 321-22, 188 So. 1, 4 (1939) (heirs not allowed to subsequently litigate legality of debts duly probated in prior action); Cotton v. Walker, 164 Miss. 208, 222, 144 So. 45, 46 (1932) (party not allowed to relitigate alleged acts of negligence); Von Zondt v. Town of Braxton, 149 Miss. 461, 464-65, 115 So. 557,

the Mississippi Supreme Court first recognized the principle of res judicata, and then proceeded to apply it to bar relitigation of both the same cause of action *and* issues previously determined in a prior cause of action. The court thus subsumed the principle of collateral estoppel under the broad banner of res judicata, without any reference to the former doctrine whatsoever. A primary requirement in these early cases was that the parties in the second action must have been either the same parties as in the first action or their privies.[39] Thus, the requirement of mutuality was incorporated into Mississippi jurisprudence at an early date.

In a 1951 domestic relations case, *Etheridge v. Webb*,[40] the court first concluded that there was a valid distinction between a subsequent suit between the same parties for the same cause of action and a later suit between the same parties on a *different* cause of action, but raising the same issues previously litigated. The court determined that the judicial doctrine involved in this latter situation should be known as "collateral estoppel by judgment."[41]

The following year, in *Palmer v. Clarksdale Hospital*,[42] the court strongly reaffirmed the mutuality of parties requirement for res judicata by analogizing to a mass tort situation with numerous claimants injured by the same negligent act.[43] This reaffirmation came almost ten years to the day after mutuality had been abandoned by the California Supreme Court in *Bernhard*.[44]

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559 (1928) (prior decree validating school bond issue was res judicata to subsequent attack by different taxpayers); Miller v. Bulkley, 85 Miss. 706, 712, 38 So. 99, 100 (1905) (prior breach of warranty suit acts as res judicata, denying buyer right to recover for breach in subsequent action).

[39] *See, e.g.*, Darrow v. Moore, 163 Miss. 705, 711, 142 So. 447, 452 (1937) (privies to prior decree are bound). *But cf.* Grandquist v. Crystal Springs Lumber Co., 190 Miss. 572, 1 So.2d 216 (1941) (res judicata extended to derivative liability situation, creating an exception to mutuality of principals requirement).

[40] 210 Miss. 729, 50 So. 2d 603 (1951).

[41] *Id.* at 742, 50 So. 2d at 606-07.

[42] 213 Miss. 611, 57 So. 2d 476 (1952).

[43] *Id.* at 620, 57 So. 2d at 480. The *Palmer* court stated that each injured party had a separate right of action that was independent of the other parties, thereby implying that mutuality would operate to preclude a finding from one case from having any bearing on subsequent actions by other plaintiffs. *Id.*

[44] *See supra* text accompanying notes 28-29.

In two subsequent cases, *Lyle Cashion Co. v. McKendrick*[45] and *Garraway v. Retail Credit Co.*,[46] the Mississippi court left no doubt that mutuality would be required in collateral estoppel cases as well.

The Mississippi Supreme Court's most recent definitive reaffirmation of the mutuality requirement as a prerequisite to a claim of collateral estoppel was the 1965 decision of *Johnson v. Bagby*.[47] Explicitly rejecting the argument for the abolition of the mutuality doctrine, the court in *Johnson* stated: "[W]e still hold that it is necessary that the parties to the subsequent action must be the same as those in the prior action."[48] Thus, as seven subsequent cases[49] indicate, Mississippi, which has required mutuality of parties since the earliest cases involving res judicata, continues to impose that requirement today.

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[45] 227 Miss. 894, 87 So. 2d 289 (1956).

[46] 244 Miss. 376, 141 So. 2d 727 (1962).

[47] 252 Miss. 125, 171 So. 2d 327 (1965).

In language fraught with significance for later decisions upholding the mutuality requirement, the court in *Johnson* stated that collateral estoppel and res judicata could not be utilized in every fact situation because of the necessity of affording each person his day in court and the difficulty of the litigant in foreseeing the possible significance in future cases of matters being currently litigated. *Id.* at 137-38, 171 So. 2d at 332.

[48] *Id.* at 133, 171 So. 2d at 330.

[49] Bush Constr. Co. v. Walters, 254 Miss. 266, 272-73, 179 So. 2d 188, 190 (1965); Pace v. Barrett, 205 So. 2d 647, 649 (Miss. 1968); Sanders v. State, 242 So. 2d 412, 414 (Miss. 1970); Warwick v. Pearl River Valley Water Supply Dist., 271 So. 2d 94, 96 (Miss. 1972); Huffman v. Griffin, 337 So. 2d 715, 719 (Miss. 1976); Magee v. Griffin, 345 So. 2d 1027, 1029-30 (Miss. 1979); Ditta v. City of Clinton, 391 So. 2d 627, 628-29 (Miss. 1980). In an opinion concurring in part and dissenting in part in *Magee v. Griffin,* Chief Justice Patterson disagreed with the majority's decision to apply collateral estoppel against the plaintiff in his suit against GMAC, at least in part, on the ground that no identity of parties existed as required in Mississippi. 345 So. 2d at 1035. It appears from the record of the case, however, that both GMAC and the plaintiff were parties to the original action, *id.* at 1029; therefore, *Magee* represents no change in the traditional mutuality requirement.

Interestingly, although the opinion in *Walters* includes a reference to privies in detailing who may invoke collateral estoppel, subsequent definitions of collateral estoppel in *Pace, Sanders, Magee,* and *Ditta* omit any mention of individuals in privity with parties. In the absence of any express language modifying the traditional rule as to privies in Mississippi, one can only assume the omission of the usual language was inadvertent. *Cf.* Thames, *Mutuality in Collateral Estoppel: Never the Twain Should Meet,* 37 Miss. L.J. 244, 261 & n.50 (1966) (absence of privity language in *Johnson v. Bagby* not indicative of change in state law of collateral estoppel).

III. Collateral Estoppel in the Fifth Circuit

As noted earlier, the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation* allowed defensive use of collateral estoppel in a patent case, thereby dispensing with the requirement of mutuality.[50] But the Court in *Blonder-Tongue* expressly declined to rule on the merits of the mutuality doctrine in general,[51] and several federal courts, operating on the belief that *Blonder-Tongue* was confined to issues of patent validity, attempted, in certain instances, to preserve mutuality.[52] The Supreme Court's later decisions in *Montana v. United States*,[53] which applied collateral estoppel to questions of law, and *Parklane Hosiery Co. v. Shore*,[54] which applied collateral estoppel to questions of fact, indicated, however, that *Blonder-Tongue* was not to be confined to its factual and legal setting. *Parklane* served to erase whatever doubt remained in the federal court system that mutuality was no longer a requirement in applying collateral estoppel.

Even before *Parklane*, the United States Court of Appeals for the Fifth Circuit had been part of a lower court[55] trend aban-

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[50] *See supra* text accompanying notes 32 through 35.

[51] Although parts of the Court's opinion are broadly worded, *see, e.g.*, 402 U.S. at 328-29, the holding is expressly limited. *Id.* at 327; *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 and 347 n.14 (1979) (both majority and dissenting opinions recognized the possible limitations of *Blonder-Tongue* holding).

[52] *See, e.g.*, Divine v. Commissioner, 500 F.2d 1041, 1046-48 (2d Cir. 1974) (policy rationales explicated by *Blonder-Tongue* to justify denial of relitigation not present in federal tax issue); Grantham v. McGraw-Edison Co., 444 F.2d 210, 217 (7th Cir. 1971) (*Blonder-Tongue* holding inapplicable where prior determination made of patent validity); United States v. Anaconda Co., 445 F. Supp. 486, 495-96 (D.D.C. 1977) (inspection of wiring systems for safety hazards is a public concern requiring strict mutuality for relitigation preclusion); Ransburg Corp. v. Automatic Finishing Systems, Inc., 412 F. Supp. 1357, 1366 (E.D. Pa. 1976) (party denied *Blonder-Tongue* estoppel in patent validity suit). *But see* Starker v. United States, 602 F.2d 1341, 1348 n.5 (9th Cir. 1979) (rejecting Government's argument to retain mutuality for federal tax cases).

[53] 440 U.S. 147 (1979). In *Montana*, the Supreme Court held collateral estoppel may be applied to resolve questions of federal law when (1) successive actions did not involve unrelated subject matters, (2) no party raising constitutional issues was forced to accept state court adjudication of those issues, and (3) there were no allegations of unfairness or inadequacy in the procedures of the prior court. *Id.* at 162-63.

[54] 439 U.S. at 326.

[55] *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d 59, 70 (4th Cir. 1977) (court refused class certification when certification was burdensome and collateral estop-

doning mutuality as a requirement of collateral estoppel. Although the Fifth Circuit had earlier noted the increasing number of jurisdictions dispensing with mutuality,[56] it was not until 1970, in *Rachal v. Hill*,[57] that the Fifth Circuit approved the use of collateral estoppel by one not a party to the prior litigation. The court's holding, however, was restricted to federal question cases[58] and, further, contained the following limiting language:

> This is not to say, however, that a party who receives an adverse determination of an issue in prior litigation will be forever estopped from relitigating that issue under all circumstances. While the requirement of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a *full and fair opportunity* to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case.[59]

One year after *Rachal*, the Fifth Circuit decided *James Talcott, Inc. v. Allahabad Bank, Ltd.*[60] In setting forth the re-

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pel would serve justice), *cert. denied*, 435 U.S. 968 (1978); Garrigan v. Giese, 553 F.2d 35, 36 (8th Cir.) (court barred civil service employee's claim against army by applying collateral estoppel), *cert. denied*, 434 U.S. 825 (1977); Gambocz v. Yelencsics, 468 F.2d 837, 842 (3d Cir. 1972) (collateral estoppel barred relitigation of claims dismissed with prejudice in prior suit); 1B J. MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.412[1] (2d ed. Supp. 1981-82).

[56] *See* Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan, 410 F.2d 718, 727-28 (5th Cir.) (collateral estoppel precluded insurer from litigating issues that were litigated by judgment creditor of insured against insurer), *cert. denied*, 396 U.S. 905 (1969). Pre-1970 decisions of the Fifth Circuit requiring mutuality include Cauefield v. Fidelity and Casualty Co. of New York, 378 F.2d 876, 878-79 (5th Cir.) (collateral estoppel applies to an action in federal court that produces the same evidence propounded in state court), *cert. denied*, 389 U.S. 1009 (1967); Williams v. Cambridge Mut. Fire Ins. Co., 230 F.2d 293, 294 (5th Cir. 1956) (for a finding to be conclusive in a later action, the parties must be the same or privies); and Johnson v. Pullman Co., 200 F.2d 751, 753 (5th Cir. 1952) (collateral estoppel did not apply to suit brought against sleeping car company alleging judgment against defendant's employees in prior action).

[57] 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

[58] 435 F.2d at 61-62.

[59] *Id.* at 62 (emphasis added). The standard imposed by the Fifth Circuit very closely tracks the guidelines set forth by the Supreme Court in *Blonder-Tongue*, 402 U.S. at 332-33.

[60] 444 F.2d 451 (5th Cir.), *cert. denied sub nom.*, City Trade & Indus., Ltd. v. Allahabad Bank, Ltd., 404 U.S. 940 (1971).

quirements of collateral estoppel, the court omitted the requirement of mutuality,[61] but expanded on those factors that might deny a party a "full and fair opportunity" to litigate, and thus preclude any later attempt to estop relitigation.[62]

Despite language in one case intimating that strict identity of parties was still required,[63] it became clear from the decisions in *Poster Exchange, Inc. v. National Screen Service Corp.*[64] in 1975 and *In re Merrell*[65] in 1979 that mutuality was no longer a requirement in the Fifth Circuit. This view was confirmed in several subsequent decisions.[66] Despite the abandonment of mutuality, several of these subsequent cases also included discussions indicating that collateral estoppel should not be invoked by a nonparty when to do so would "result in manifest injustice,"[67] contravene an important public policy,[68] "lead to unjust results,"[69] or simply violate basic considerations of fairness.[70]

The offensive use of collateral estoppel has been approved by the Fifth Circuit in at least one case, *Johnson v. United States*.[71] The court in *Johnson*, however, took care to place particular emphasis on the potential harshness that might result from the unrestricted application of offensive estoppel.[72] This

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[61] 444 F.2d at 458-59; *see also id.* at 461 (discussing the trend abandoning the mutuality requirement).

[62] *Id.* at 461-62. The court noted the "full and fair opportunity" standard necessitated a case-by-case approach to the application of collateral estoppel. The court outlined two situations in which a later attempt to apply collateral estoppel might be unfair. First, when the party was defending against a relatively small claim in the prior action and thus might not have been motivated to litigate as vigorously as he might under other conditions. Secondly, unfairness might result from an attempt to "bind a party to a judgment rendered in a forum that he had no opportunity to choose or change." *Id.*

[63] *See* Mosher Steel Co. v. NLRB, 568 F.2d 436, 440 (5th Cir. 1978) ("collateral estoppel is applicable only if the same parties or their privies are involved in both actions").

[64] 517 F.2d 117 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

[65] 594 F.2d 1064 (5th Cir. 1979).

[66] *See infra* cases cited in notes 67, 68, and 83.

[67] Garner v. Giarrusso, 571 F.2d 1330, 1336 (5th Cir. 1978).

[68] Bogard v. Cook, 586 F.2d 399, 408 (5th Cir. 1978); Johnson v. United States, 576 F.2d 606, 614 (5th Cir. 1978); Garner v. Giarrusso, 571 F.2d 1330, 1336 (5th Cir. 1978).

[69] Johnson v. United States, 576 F.2d 606, 614 (5th Cir. 1978).

[70] *Id.* at 614-15.

[71] *Id.* at 615.

[72] *Id.* at 614-15.

hesitancy in permitting a nonparty (or even the previous party) to assert collateral estoppel offensively was again apparent in *Hicks v. Quaker Oats Co.*[73] In *Hicks*, the Fifth Circuit reversed a lower court ruling that had permitted the use of offensive collateral estoppel with respect to an issue that had been an unappealed alternative ground for decision in the prior litigation. The court applied the criteria established in *Parklane Hosiery Co. v. Shore* and found that offensive use would be unfair to the defendant.[74] Thus, even before the recent decision in *Hardy v. Johns-Manville Sales Corp.*,[75] it was apparent that although mutuality is no longer required, the defensive use of collateral estoppel in the Fifth Circuit is still subject to considerations of public policy and fairness,[76] and any attempt to apply collateral estoppel offensively will be met with a rigid application of the criteria set forth in *Parklane Hosiery*.

IV. Applicable Law for Federal Courts: State or Federal?

As is obvious from the two preceding sections, Mississippi law on the use of collateral estoppel differs rather significantly from that of the Fifth Circuit. While Mississippi still requires mutuality and has yet to permit defensive use by a nonparty, the Fifth Circuit has sanctioned offensive use by a nonparty. It is thus apparent that the question of whether state or federal law is applicable to a particular action can often be a crucial one. Under the guidance of *Erie R.R. Co. v. Tompkins*,[77] it is possible to establish some general guidelines in this area.

It is generally agreed that if both the case relied upon as conclusive and the current action (in which collateral estoppel is sought to be applied) are in state court, or if one was or is in

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[73] 662 F.2d 1158 (5th Cir. 1981).

[74] *Id.* at 1170-73.

[75] 681 F.2d 334 (5th Cir. 1982); *see infra* notes 123 through 137 and accompanying text.

[76] In so providing, the decisions of the Fifth Circuit conform to the direction of the Supreme Court in replacing the requirement of mutuality with considerations of fair and equitable opportunities to litigate. *See* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 349 (1971).

[77] 304 U.S. 64 (1938).

state court and the other is in federal court based on diversity jurisdiction, then the *state* law of collateral estoppel is applicable.[78] Further, it is well established that if either the prior or present action involves a federal question, the *federal* law of collateral estoppel applies.[79]

The more difficult question, and the situation that arises most frequently, occurs when the former action was and the present case is in federal court based on diversity jurisdiction. A majority of the circuit courts of appeal that have considered the question have held that, under *Erie,* the collateral estoppel rules of the *state* where the district court sat must be applied.[80] Because both collateral estoppel and res judicata generally are viewed as "substantive" and "outcome-determinative"[81] for purposes of *Erie* analysis, this reasoning appears to be well-founded. The Fifth Circuit, however, has reached a different result. Relying less on the *Erie* doctrine than on the importance of preserv-

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[78] Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949); Angel v. Bullington, 330 U.S. 183, 192 (1947); Cleckner v. Republic Van & Storage Co., 556 F.2d 766, 769 (5th Cir. 1977); Murphy v. Landsbury, 490 F.2d 319, 323 (3d Cir. 1973); Mackris v. Murray, 397 F.2d 74, 75 (6th Cir. 1968).

[79] Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 324 (1971); Angel v. Bullington, 330 U.S. 183, 192 (1947); Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); Williams v. Ocean Transp. Lines, Inc., 425 F.2d 1183, 1189-90 (3d Cir. 1970); Howard v. Ladner, 116 F. Supp. 783, 792-93 (S.D. Miss. 1953), *vacated on other grounds*, 347 U.S. 910 (1954). For a detailed discussion of whether a federal court exercising federal question jurisdiction may give a prior state court judgment greater estoppel effect based on federal common law than would the state court applying its own law, see Reimer v. Smith, 663 F.2d 1316, 1325-26 & n.11 (5th Cir. 1981).

[80] *See* St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583, 585 (4th Cir. 1973); Ritchie v. Landau, 475 F.2d 151, 154 (2d Cir. 1973); Gambocz v. Yelencsics, 468 F.2d 837, 841 n.4 (3d Cir. 1972); Hackler v. Indianapolis & S.E. Trailways, Inc., 437 F.2d 360, 362 (6th Cir. 1971); Priest v. American Smelting & Refining Co., 409 F.2d 1229, 1231 (9th Cir. 1969); Melaro v. Mezzanotte, 352 F.2d 720, 722 (D.C. Cir. 1965); Rust v. First Nat'l Bank, 466 F. Supp. 135, 138 (D. Wyo. 1979); Clarke v. Volkswagen of Am., Inc., 419 F. Supp. 74, 75 (S.D. Iowa 1976); Lewis v. International Business Machs. Corp., 393 F. Supp. 305, 307 (D. Or. 1974); Annot., 19 A.L.R. Fed. 709 (1974 & Supp. 1981); *see also* Semler v. Psychiatric Inst. of Washington, D.C., Inc., 575 F.2d 922, 927 (D.C. Cir. 1978) (*Erie* expands full faith and credit clause to require federal courts to follow res judicata rules of original forum state.)

[81] The "outcome-determinative" test, set forth in Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945), indicates state law should apply in federal court if the determination of which law to apply might affect the outcome of the case.

ing the integrity of federal court judgments,[82] the Fifth Circuit has ruled that *federal* law should determine the collateral estoppel effect given a prior decision of a federal court, regardless of the basis of the prior court's jurisdiction.[83] Thus, the only occasion the Fifth Circuit will have to apply Mississippi's restrictive rules on collateral estoppel is when the prior action was actually litigated in state court. To the limited extent this fact might influence a plaintiff's initial choice of a federal or state forum or, to a greater degree, a defendant tortfeasor's decision on removal to federal court,[84] the marked distinctions between Mississippi

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[82] *See* Stovall v. Price Waterhouse Co., 652 F.2d 537, 541 (5th Cir. 1981) (quoting Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962)); Johnson v. United States, 576 F.2d 606, 612 (5th Cir. 1978) (Congress did not intend state court rules to determine the effect one federal court is to give to the judgment of another), *cert. denied*, 451 U.S. 1081 (1981).

In reaching a result similar to that reached by the Fifth Circuit, some courts and commentators have concluded that the res judicata and collateral estoppel effects of a judgment are dictated by full faith and credit and thus should be based on the law of the court rendering the original judgment. One writer has stated:

> Whether the argument is based on "full faith and credit" standing alone, or "full faith and credit" as a supporting basis for application of the *Byrd* [v. Blue Ridge Elec. Corp., 356 U.S. 525 (1958)] doctrine, the result achieved should be the same—federal courts will apply federal rules of res judicata where the judgment was entered by a federal court in the first action, and this is so whether the judgment court was sitting in diversity or had independent federal jurisdiction.

Comment, *Res Judicata in the Federal Courts: Application of Federal or State Law: Possible Differences Between the Two*, 51 CORNELL L.Q. 96, 102-03 (1965). The writer reaches the same result with regard to collateral estoppel. *Id.* at 107.

[83] *See* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 337 (5th Cir. 1982); Reimer v. Smith, 663 F.2d 1316, 1325 n.9 (5th Cir. 1981); Hicks v. Quaker Oats Co., 662 F.2d 1158, 1166 (5th Cir. 1981) (only use state's rule of collateral estoppel if prior determination was by state court); Southern Pac. Transp. Co. v. Smith Material Corp., 616 F.2d 111, 115 (5th Cir. 1980); Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); Willis v. Fournier, 418 F. Supp. 265, 266 (M.D. Ga.), *aff'd mem.*, 537 F.2d 1142 (5th Cir. 1976). *But see* Maher v. City of New Orleans, 516 F.2d 1051, 1056 (5th Cir. 1975) (state law controls); Breeland v. Security Ins. Co., 421 F.2d 918, 921 (5th Cir. 1969) (same). Although definitively established by its recent decisions, the Fifth Circuit position on the application of federal or state law was sufficiently unclear in 1980 to lead the court in McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335, 338 (S.D. Miss. 1980), to rule that state law of collateral estoppel controlled in diversity cases.

[84] Based solely on considerations of the doctrine of collateral estoppel, a defendant tortfeasor would apparently never want to remove a mass tort case to federal court. Even though mutuality is not required in federal court, if the defendant *wins* in federal court in the first action he would be prohibited by the due process clause from asserting the judgment defensively against a later plaintiff because that plaintiff has not yet had his

and federal law should be carefully considered and evaluated.

V. The Offensive Use of Collateral Estoppel in the Mass Tort/Multiple Plaintiff Context

A. Offensive Use in General

As earlier noted, despite a growing number of decisions permitting the defensive use of collateral estoppel, many jurisdictions still refuse to allow estoppel to be asserted offensively.[85] This distinction is understandable in light of some fundamental differences that distinguish offensive use from defensive use. The primary objections to the offensive use of collateral estoppel may be summarized as follows. First, unlike defensive use, offensive use may tend to increase, rather than decrease, litigation.[86] Offensive estoppel provides the mass tort plaintiff with a strong incentive in avoiding joinder and thus awaiting the outcome of litigation commenced by other plaintiffs. This "wait and see" posture is advisable, for should the defendant prevail in the initial action, the nonjoining plaintiff would not be bound by that determination. Conversely, should the defendant lose the initial action, the passive plaintiff could assert his claim by relying on the prior determination to foreclose any defense of nonliability. The plaintiff, therefore, can only gain an advantage by not intervening in the first action. Thus, the defendant may be sued re-

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"day in court." The result would be the same if the first action was in state court. But, if the first case was in federal court and the defendant *loses*, a subsequent plaintiff may be able to assert that judgment offensively against him in a later federal action. A defendant's initial loss in a Mississippi court, on the other hand, would not be fatal to him in a later case because the mutuality requirement would bar any attempts at precluding relitigation. Obviously, however, factors other than the rules of collateral estoppel govern a defendant's decision to remove a case to federal court.

[85] Cases that have allowed defensive use of collateral estoppel while specifically prohibiting offensive use include: Russell v. Atlas Van Lines, Inc., 411 F. Supp. 111, 114-15 (E.D. Okla. 1976); Standage Ventures, Inc. v. State, 114 Ariz. 480, 562 P.2d 360, 364 (1977); Goolsby v. Derby, 189 N.W.2d 909, 916-17 (Iowa 1971); Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 238 N.E.2d 55, 59 (1968); *see also* Environmental Defense Fund, Inc. v. Alexander, 501 F. Supp. 742, 750 (N.D. Miss. 1980) (courts more reluctant to allow offensive use than defensive use); RESTATEMENT (SECOND) OF JUDGMENTS § 29, reporter's note at 299 (1982) (noting hesitancy to permit offensive use but stating that recent trend has been to equate offensive and defensive issue preclusion).

[86] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-30 (1979).

peatedly by different plaintiffs who refuse to participate in the previous suits although joinder is possible.[87] Second, offensive use could permit a plaintiff to bind by collateral estoppel a defendant whose loss in the prior action may have been caused by tactical disadvantages, such as the plaintiff's right to choose the place and time of trial, rather than infirmities in the defendant's case.[88] Third, offensive use may be unfair to a defendant who refrained from offering a vigorous defense in the prior trial because the damages sought in that trial were nominal. The plaintiff in the second action who seeks to recover a much larger amount provides the necessary motivation for the defendant to defend. Offensive use, on the other hand, would require that the defendant be restricted to his earlier defense. This problem is especially unfair when the possibility of future plaintiffs was unforeseeable to the defendant in the first action.[89] Fourth, offensive use of collateral estoppel could be unjust where the defendant in the second action desired to avail himself of procedural opportunities unavailable in the first action.[90] Finally, offensive collateral estoppel may allow a plaintiff to rely upon a judgment against a defendant even if inconsistent with judgments previ-

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[87] *Id.*; *see* Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111, 119 (1958) (separate actions maintained); Reardon v. Allen, 88 N.J. Super. 560, 213 A.2d 26, 26-27 (Law Div. 1965) (suits brought by insurer and insured); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel By a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1034-36 (1967) (discussing *Nevarov* and *Reardon*).

[88] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 n.15 (1979); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 729-30, 298 N.Y.S.2d 955, 961-62 (1969) (plaintiff offered prior adverse judgment against defendant who had been plaintiff's co-defendant in prior proceeding).

[89] *See* Rawls v. Daughters of Charity of St. Vincent DePaul, Inc., 491 F.2d 141, 148 (5th Cir. 1974) (less incentive to contest prior habeas corpus action than to challenge present false imprisonment claim); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 540-41 (2d Cir. 1965) (small adverse judgments in prior proceedings held insufficient inducement for unsuccessful defendant to fully litigate merits), *cert. denied*, 382 U.S. 983 (1966); Lewis v. International Business Machs. Corp., 393 F. Supp. 305, 308-09 (D. Ore. 1974) (collateral estoppel denied when employee lacked incentive to vigorously litigate prior application for unemployment benefits); Johnson v. Bagby, 252 Miss. 125, 137, 171 So. 2d 327, 332 (1965) (difficult to foresee possible future significance of matters currently litigated).

[90] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 & n.15 (1949); RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment d (1982).

ously rendered for the defendant.[91]

Certain of the preceding dangers of offensive collateral estoppel are felt by many to be particularly acute when applied to the types of mass tort situations referred to at the beginning of this article. These types of situations inevitably involve multiple tort plaintiffs who usually reside in different jurisdictions, and who often come into court under quite different circumstances. With one possible exception,[92] each of the preceding five objections to the offensive use of collateral estoppel is directly applicable to the multiple tort plaintiff situation. Perhaps the earliest, and one of the most persuasive, arguments against offensive use in the multiple claimant scenario centers on the final objection just outlined—the possibility of inconsistent judgments. In a 1957 article,[93] Professor Brainard Currie, then an advocate of the mutuality requirement, presented the hypothetical case of a railroad accident in which a train derails and injures fifty passengers. Each passenger brings a separate personal injury action against the railroad for the same alleged negligent conduct. Professor Currie noted that if the railroad won the first twenty-five cases, it could not raise collateral estoppel against any of the remaining litigants because they had not yet had their day in court. But, if the railroad lost the twenty-sixth case, and if mutuality is no longer required, the remaining twenty-four plaintiffs could invoke collateral estoppel against the railroad on the issue of negligence. Thus, the railroad would win the first twenty-five cases decided separately and lose the remainder on the basis of a single judgment that, Currie argued, might well be an "aberration" attributable to that jurisdiction or to the sympathy of the jury. Currie further noted that this aberrant judgment could just as easily have come in the first case, leaving the defendant with the unhappy prospect of litigating forty-nine ad-

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[91] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470, 475 (Law Div. 1967); Currie, *supra* note 24, at 281-89.

[92] In response to the contention that a defendant may fail to litigate an initial action vigorously because of the unforeseeability of additional plaintiffs in the future, one commentator has stated that foreseeability appears to be presumed in the litigation of mass accident cases because it is common knowledge that multiple suits typically follow mass accidents. Note, *supra* note 30, at 584.

[93] Currie, *supra* note 24, at 281-82.

ditional cases on the basis of damages alone. Currie's argument gains added force when one considers it is the plaintiff who possesses the initiative, and he or she may bring suit in a forum inconvenient to the defendant or in one that allows the particular plaintiff to maximize considerations of sympathy. Currie concluded this type of result should not be tolerated under any rational concept of fair play.[94]

Perhaps fueled by Currie's inconsistent judgments argument, additional objections to the offensive use of collateral estoppel in mass accident cases were voiced. One argument, that the defendant in the first action may not have been motivated to present a full defense, was addressed in two cases in the 1960's. *Berner v. British Commonwealth Pacific Airlines, Ltd.*,[95] involved an airplane crash in which one passenger recovered $35,000 from the defendant airline. The airline did not appeal that judgment. Subsequently, several other passengers sued the airline for over $7,000,000 and sought to invoke collateral estoppel on the issue of negligence.[96] The Second Circuit denied the plea of estoppel and limited offensive use of collateral estoppel to situations in which the party against whom the plea is asserted could foresee subsequent litigation and thus had an incentive to defend the first action fully. The court held the defendant's failure to appeal indicated it had not been as motivated to vigorously contest liability in the first suit as it might have been had it been faced with the second suit's damages.[97] In reaching its decision, the *Berner* court distinguished *United States v. United Air Lines, Inc.*,[98] decided three years earlier. This case, which allowed offensive use of collateral estoppel, resulted from a mid-air collision between United's airliner and a military jet.[99] The initial litigation involved twenty-four of the thirty-one wrongful death claims eventually filed, consumed almost fifteen weeks, and resulted in a verdict of $2,337,308 for

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[94] *Id.* at 281-89.

[95] 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

[96] 346 F.2d at 538-41.

[97] *Id.* at 540-41.

[98] 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964).

[99] 216 F. Supp. at 712-13.

the plaintiffs.[100] The remaining seven plaintiffs were allowed to preclude the defendant from relitigating the question of liability in the second action because the court found the defendants were motivated to try the case in a "full and thorough" manner in the first suit.[101]

Interestingly, courts and legal commentators have disagreed sharply over whether the offensive use of collateral estoppel is appropriate in mass tort actions. One court has stated, "The *Bernhard* Doctrine abandoning the requirement of strict mutuality is especially applicable to protracted multiple litigation arising from common disasters where the factual and legal issues concerning the liability of defendants are identical."[102] In addition, one commentator supports the imposition of the restrictive mutuality requirement, *except* in mass disaster cases.[103] The writer reasoned that "defendants in such circumstances do not have a realistic expectation of winning later suits because of the high emotional appeal to the jury of mass-disaster claims" and therefore "nothing will be gained from relitigating the issue of liability."[104]

In contrast, an intermediate California court[105] has excluded "multiple claims of different persons for personal injuries or property damage against a single defendant or set of defen-

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[100] *Id.* at 728, 730.

[101] 216 F.Supp. at 730.

[102] *In re* Air Crash Disaster, 350 F. Supp. 757, 765 (S. D. Ohio 1972); *see also* Mooney v. Fibreboard Corp., 485 F. Supp. 242, 247 (E.D. Tex. 1980) ("an asbestosis case, like many other mass torts, . . . is an appropriate candidate for the offensive use of collateral estoppel").

Courts that have allowed offensive use in mass tort cases include: Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 335, 337-38 (C.D. Cal. 1981); Maryland v. Capital Air Lines, Inc., 267 F. Supp. 298, 303 (D. Md. 1967); United States v. United Air Lines, Inc., 216 F. Supp. 709, 729 (E.D. Wash. 1962), *aff'd sub nom.* United Airlines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470, 477 (Law Div. 1967); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810, 814 (Sup. Ct. 1969).

Commentators that have advocated offensive use in mass tort cases include: Overton, *supra* note 21, at 930, 943-44; Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URBAN L.J. 55, 89-91 (1978); Note, *Collateral Estoppel—The Multiple Tort Claimant Anomaly*, 41 MISS. L.J. 497, 507 (1970).

[103] Overton, *supra* note 21, at 930, 943-44.

[104] *Id.* at 943.

[105] Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958).

dants growing out of a single accident" from application of the *Bernhard* doctrine.[106] Other commentators argue the multiple plaintiff setting gives rise to such potential unfairness to the common defendant that mutuality must be required.[107] The significant number of courts that have explicitly refused to allow offensive use of collateral estoppel, while permitting defensive use, also implicitly lent their support to the prohibition on use by plaintiffs in mass tort cases.[108]

B. The Parklane Criteria

As noted earlier, the United States Supreme Court has had the opportunity to consider the various objections to the offensive use of collateral estoppel. In *Parklane Hosiery Co. v. Shore*,[109] the Court decided against totally precluding offensive use, but formulated certain criteria, aimed directly at the objections, which are to aid the trial judge in determining whether offensive use would be appropriate in a particular case. The Court concluded that offensive collateral estoppel should not be allowed in two situations: when the plaintiff asserting the doctrine "could easily have joined in the earlier action" and when application of the doctrine "would be unfair to a defendant."[110] The Court then established four situations that could indicate unfairness in the application of estoppel. First, if "a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future

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[106] *Id.* at 778, 327 P.2d at 119. Shortly afterwards, in Price v. Atchison, Topeka & Santa Fe Ry., 164 Cal. App. 2d 400, 330 P.2d 933, 935 (1958), the same court followed *Nevarov* in refusing to allow a nonparty passenger to estop a defendant railroad from relitigating the issue of negligence in a train derailment.

[107] *See* Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, *supra* note 24, at 288; Thames, *supra* note 49, at 256-58 (arguing against both mutuality and offensive use of estoppel); Note, *supra* note 21, at 639, 679.

[108] *See supra* note 85.

[109] 439 U.S. 322 (1979).

[110] *Id.* at 331. At least one case has indicated that the fact that a subsequent plaintiff *could* have joined the prior action is not, by itself, an absolute bar to the use of collateral estoppel. Starker v. United States, 602 F.2d 1341, 1349 (9th Cir. 1979); *see also* Collins v. Seaboard Coastline R. Co., 516 F. Supp. 31, 33 (S.D. Ga. 1981) (adequate explanation for nonjoinder permits collateral estoppel).

suits are not foreseeable."[111] Second, the Court addressed the situation presented by Professor Currie's railroad hypothetical by stating it may be unfair to apply estoppel in cases in which "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant."[112] Third, "where the second action affords the defendant procedural opportunites unavailable in the first action that could readily cause a different result," estoppel may be inappropriate.[113] Finally, when "other reasons" exist which might give rise to unfairness, offensive use may be held inapplicable.[114]

C. *Parklane Applied: Hardy v. Johns-Manville*

With 16,000 pending suits and 400 to 500 more being added each month,[115] the asbestos liability cases currently represent the preeminent forum for application of collateral estoppel principles to a mass tort situation. Indeed, a number of cases have already considered whether the 1973 Fifth Circuit decision in *Borel v. Fibreboard Paper Products Corp.*[116] served to preclude the *Borel* defendants, as well as other manufacturers and sellers in privity with them, from relitigating questions essential to a plaintiff's recovery in an asbestos case. Among the issues sought to be estopped from future litigation are whether certain defen-

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[111] 439 U.S. at 330.

[112] *Id.* Like the other considerations offered by the Court, the inconsistent judgments criterion is based on items enumerated in the RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). For a pre-*Parklane* application of the inconsistent verdicts question, see Blumcraft of Pittsburg v. Kawneer Co., 482 F.2d 542, 548-49 (5th Cir. 1973) (permitting estoppel); State Farm Fire & Casualty Co. v. Century Home Components, Inc., 550 P.2d 1185, 1191-94 (Or. 1976) (denying estoppel).

[113] *Id.* at 330, 331 & n.15.

[114] *Id.* at 331.

[115] *See supra* note 1.

[116] 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). *Borel* was a diversity lawsuit in which certain producers of asbestos insulation products were held strictly liable to an insulation worker who contracted asbestosis and mesothelioma. Products containing asbestos were found to be unreasonably dangerous because of the defendants' failure to adequately warn of the unsafe nature of the products. *Id.* at 1093. In Karjala v. Johns-Manville, 523 F.2d 155, 156-57 (8th Cir. 1975), the court held that the evidence in an action by an asbestos worker on a claim that defendant's products were unreasonably dangerous and that the defendant failed to warn of the defective condition was sufficient to support a verdict for the plaintiff.

dants manufactured, sold, or distributed asbestos products,[117] whether products containing asbestos are defective and unreasonably dangerous,[118] whether asbestos dust is a competent producing cause of mesothelioma,[119] and whether a plaintiff's exposure to asbestos is a substantial factor in causing the asbestos-related injuries claimed.[120] At least twelve state and federal district courts have confronted the question of issue preclusion in the asbestos arena. Of this number, seven [121] have denied offensive collateral estoppel motions and five[122] have allowed preclusion on at least one issue. True to the discretionary nature of the

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[117] *See, e.g.*, Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836, 838-39 (E.D. Tex. 1980) (approving use of offensive collateral estoppel); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 249 (E.D. Tex. 1980) (same).

[118] *See, e.g.*, Migues v. Fibreboard Corp., 662 F.2d 1182, 1185-86 (5th Cir. 1981) (citing lower court holding); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1363 (E.D. Tex. 1981) (justice as well as judicial economy warrants doctrine's application), *rev'd*, 681 F.2d 334 (5th Cir. 1982); Tretter v. Johns-Manville Corp., 88 F.R.D. 329, 333 (E.D. Ohio 1980) (basis for estoppel is inconsistent with previous judgments).

[119] *See, e.g.*, Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 544 (D. Minn. 1982) (estoppel applied to issue of whether asbestos dust can cause disease); Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980) (dust is a cause of mesothelioma). Mesothelioma is a relatively rare form of cancer of the lungs and abdomen which has been traced to asbestos exposure. Hardy v. Johns-Manville Sales Corp., 509 F. Supp. at 1355, *rev'd*, 681 F.2d 334 (5th Cir. 1982).

[120] *See, e.g.*, Amader v. Johns-Manville Corp., 541 F. Supp. 1384, 1387 (E.D. Pa.) (doctrine applied to defectiveness of "Unibestos"), *rev'd on rehearing*, No. 79-4546 (August 4, 1982). The question of the proximate cause of each individual plaintiff's injuries is one unique to each litigant and thus cannot properly be the subject of a collateral estoppel order. *See* 541 F. Supp. at 1387; Hardy v. Johns-Manville Sales Corp., 509 F. Supp. at 1362 (the "can it" question of causation is a proper subject for preclusion; however, the "did it" question must be litigated in each case), *rev'd*, 681 F.2d 334 (5th Cir. 1982).

[121] Amader v. Johns-Manville Corp., 541 F. Supp. 1384, 1387 (E.D. Pa.), *rev'd on rehearing*, No. 79-4546 (August 4, 1982); Maloney v. Johns-Manville Sales Corp., No. C79-167 (N.D. Ohio July 26, 1982); Diagiacomo v. Johns-Manville Corp., No. 76-604 (D.N.J. May 3, 1982); McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335, 339-40 (S.D. Miss. 1980); Tretter v. Johns-Manville Corp., 88 F.R.D. 329, 333 (E.D. Mo. 1980); Van Harville v. Johns-Manville Prod. Corp., No. 78-642 (S.D. Ala. Dec. 11, 1980) (recommendation of magistrate); Getty v. Johns-Manville Sales Corp., No. 79L28278 (Cook Cty. Ill. Cir. Ct. Feb. 5, 1982).

[122] Migues v. Fibreboard Corp., 662 F.2d 1182, 1185-89 (5th Cir. 1981); Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 544 (D. Minn. 1982); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1361 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982); Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 248 (E.D. Tex. 1980).

doctrine's application, the cases reveal divergent interpretations of the criteria outlined by the United States Supreme Court in *Parklane* to help determine when offensive use would be inappropriate.

The 1982 decision of the Fifth Circuit in *Hardy v. Johns-Manville Sales Corp.*[123] represents the first post-*Parklane* court of appeals decision applying offensive collateral estoppel considerations in detail to a true mass tort situation.[124] The decision is an important one in light of the precedential and persuasive value that will undoubtedly be accorded the court's treatment of the *Parklane* criteria.[125] The careful and well-reasoned application of the fairness criteria in *Hardy* stands as a bright light from which other courts may seek illumination in addressing similar issues.

At issue in *Hardy* was a lower court ruling collaterally estopping all defendants from litigating the issues of whether asbestos products are unreasonably dangerous and whether asbes-

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[123] 681 F.2d 334 (5th Cir. 1982).

[124] The decision of the Fifth Circuit in Behringer v. Standard Asbestos Mfg. & Insulating Co., No. 81-2229 (5th Cir. July 14, 1982) may actually represent the first such decision. In *Behringer*, decided approximately two weeks before *Hardy*, the court reversed a $300,000 verdict in favor of the widow of a former asbestos worker because it hinged on a summary judgment granting collateral estoppel based on *Borel*. The court relied on the reasoning in its forthcoming decision in *Hardy* to support its ruling, however.

[125] One early indication of the persuasive value to be accorded the judgment of a court of appeals on the preclusion question may be seen in the decision of a federal district judge in Pennsylvania. On July 1, 1982, Judge Troutman of the Eastern District of Pennsylvania entered an order granting, in part, plaintiff's motion for partial summary judgment based on offensive collateral estoppel. Amader v. Johns-Manville Corp., 541 F. Supp. 1384, 1387 (E.D. Pa. 1982). The decision of the Fifth Circuit in *Hardy* was released on July 26, 1982. On August 4, 1982, Judge Troutman reversed his earlier ruling that had estopped a manufacturer from litigating the issue of defectiveness. The judge did so on the basis of the *Hardy* decision. The jury returned a verdict the following day for the defendant, finding the asbestos product was not a substantial factor in the plaintiff's injuries. Asbestos Litigation Reporter 5323-24 (Aug. 13, 1982).

Decisions in several DES cases since *Hardy* also reflect a growing unwillingness to permit offensive estoppel in products liability cases. Following the affirmance of a verdict against the defendant in Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982), at least eight plaintiffs in DES cases have attempted to use collateral estoppel to support their motions for partial summary judgment. Seven of the motions have been denied and only one has been granted. *See* Wheeler & Alee, *Collateral Estoppel in Products Liability Cases*, Nat'l L.J., Dec. 13, 1982, at 18, col. 4 and 24, col. 3 (citing cases and criticizing decision permitting use of collateral estoppel).

tos dust can cause mesothelioma.[126] Under the lower court order, the defendants were precluded, from presenting "state of the art"[127] evidence on the issue of knowledge of danger of exposure to asbestos products as it relates to a duty to warn consumers. After determining that federal law of collateral estoppel governed,[128] the Fifth Circuit divided the defendants into two groups: those who were parties to *Borel* and those who were not. As to the non-*Borel* defendants, the court quickly determined that estoppel was improper because these thirteen defendants lacked privity with the prior parties and thus had never had their day in court on the relevant issues.[129] In rejecting an overly expansive view of the privity concept, the court noted that no express or implied legal relationship existed between the two groups of defendants.[130] Additionally, the court also recognized that the mere fact the non-*Borel* defendants were *interested* in the outcome did not evince such an *interest* on their part in the outcome as to make the defendants therein their binding representatives.[131]

Consideration of the issue with regard to the *Borel* defendants, in turn, necessitated resort to the principles of *Parklane*. The court first determined that *Borel*, while conclusive of a general duty to warn, "is ultimately ambiguous as to certain key issues."[132] Because *Borel* could not be interpreted as having necessarily[133] decided that all asbestos manufacturers knew or should have known of the dangerousness of their products

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[126] 681 F.2d at 336-37; *see* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. at 1363 (the court's omnibus order concerning preclusion of litigating certain issues in asbestos cases).

[127] "State of the art" evidence is evidence which helps to establish whether, as of a given time, warnings should have been given of the dangers associated with a product placed on the open market. 681 F.2d at 337.

[128] *Id.* at 337-38; *see supra* notes 82, 83 and accompanying text.

[129] *Id.* at 338-39.

[130] *Id.* at 339-40; *see infra* notes 136 through 144 and accompanying text.

[131] 681 F.2d at 340.

[132] *Id.* at 343.

[133] In James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-59 (5th Cir. 1971), the court held that in order to invoke collateral estoppel, the moving party must show that: (1) the issue to be precluded is identical to that involved in the prior action; (2) the issue was "actually litigated" in the prior action; and (3) the resolution of the issue in the prior action was necessary and essential to the prior judgment.

before the first warnings were issued in 1964, the ambivalence of the jury's verdict rendered it an inappropriate subject for preclusion.[134] Second, the court noted that even if strict identity of essential issues was present, the fact that a substantial number of asbestos cases had been decided in favor of defendants created the problem of inconsistent verdicts that the Supreme Court had cautioned against in *Parklane*.[135] The court reasoned, "One jury's determination should not, merely because it comes later in time, bind another jury's determination of an issue over which there are equally reasonable resolutions of doubt."[136] Finally, the Fifth Circuit held that, even if the other factors were absent, the application of collateral estoppel would be unfair because the *Borel* defendants could not have foreseen that the judgment rendered in that case would be used to preclude relitigation of issues in thousands of later cases involving exposure in the hundreds of millions of dollars.[137]

D. Offensive Collateral Estoppel After Hardy

The manner in which the *Hardy* court chose to address the collateral estoppel issue supports the Supreme Court's determination that the matter is one best left to the discretion of individual lower courts. The Fifth Circuit's initial consideration of the privity concept, an issue not directly addressed in *Parklane*, however, stands in importance alongside the court's application of the fairness criteria. In determining that the non-*Borel* defendants lacked privity with the prior defendants, the court effectively rebutted any inference that a mere identity of interests would suffice to bind nonparties to an earlier judgment.[138] The

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[134] 681 F.2d at 342-45.

[135] *Id.* at 345-46. The Fifth Circuit noted that approximately half of the litigated cases had resulted in defense verdicts. *Id.* A recent survey of 147 asbestos trials nationwide, while differing somewhat from the Fifth Circuit's figures, reveals a strong basis for the court's holding on this point. The survey listed 86 plaintiff verdicts, 38 defense verdicts, 19 cases settled during trial, two mistrials and two other verdicts too complicated to classify. Asbestos Litigation Reporter 5647, 5663-71 (Oct. 8, 1982).

[136] 681 F.2d at 346.

[137] *Id.* at 346-47.

[138] *Id.* at 339-40. *See* Griffin v. Burns, 570 F.2d 1065, 1071 (1st Cir. 1978) (similarity of interests insufficient); Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 95 n.40, 97 (5th Cir. 1977) (rejecting "concurrent interest privity"); Fabricius v. Freeman,

court thus rejected the attempted expansion of its previously established doctrine of "virtual representation"[139] and clarified dicta from prior cases that was subject to potentially broad application. In mass tort cases involving multiple defendants, it is clear that a nonparty defendant should be considered to be in privity with an unrelated[140] party only when the nonparty controlled the presentation of proof in the prior action,[141] when the nonparty agreed to be bound by the prior determination,[142] or when the nonparty invested the prior party with the authority to represent the nonparty.[143] Privity is not established if the nonparty is, in the later action, represented by attorneys who participated in the defense of the prior action.[144] Likewise, the participation by a defendant in a prior trial should not be determinative if the party lacked the opportunity to present his case adequately.[145] There must be some express or implied legal relationship in which parties to the initial suit become accountable to nonparties in order for privity to exist.[146] Indeed, it would

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466 F.2d 689, 693 (7th Cir. 1972) (fact that judicial precedent established for later action not determinative); Hann v. Carson, 462 F. Supp. 854, 861 n.3 (M.D. Fla. 1978) (concurrent interests not sufficient).

[139] *Id.* at 340-41. *See* Aerojet-General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir.) (application of virtual representation), *cert. denied*, 423 U.S. 908 (1975).

[140] The existence of a legal relationship between the former and current parties will usually result in a finding of privity. Examples of such relationships include those between trustees, executors or guardians and beneficiaries, the representative of a class and a class member, RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982), trade associations and their members, General Foods v. Massachusetts Dep't of Pub. Health, 648 F.2d 784, 787-88 (1st Cir. 1981); Expert Elec., Inc. v. Levine, 554 F.2d 1227, 1233-34 (2d Cir. 1977), and a corporation and its alter ego stockholder, Dudley v. Smith, 504 F.2d 979, 982-83 (5th Cir. 1974). *But cf.* De Vargas v. Panama Canal Co., 495 F. Supp. 779, 781 (D.C.Z. 1980) (master-servant relationship by itself insufficient to establish privity).

[141] RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982).

[142] *Id.* § 40.

[143] *Id.* § 41(1)(b); *see, e.g.*, General Foods Corp. v. Massachusetts Dep't of Pub. Health, 648 F.2d 784, 787 (1st Cir. 1981) (approving Restatement rule).

[144] Pollard v. Cockrell, 578 F.2d 1002, 1009 (5th Cir. 1978); Humpreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974). The court in Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 102 (5th Cir. 1977), however, used the fact that lawyers in the second action were familiar with the prior litigation to support its finding that due process was not violated by imposing collateral estoppel in the later case.

[145] Pinto Trucking Serv., Inc. v. Motor Dispatch, Inc., 649 F.2d 530, 532-33 (7th Cir. 1981).

[146] United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980).

be as unfair to bind to an adverse prior judgment nonparty defendants who merely manufactured similar products as prior parties on the ground that they shared common interests, as it would be to bind nonparty plaintiffs to a prior unfavorable judgment on the ground that, as victims, their interests were completely concurrent and interchangeable. Just as due process protects plaintiffs in this latter situation,[147] so must it operate to protect defendants whose legal interests were not represented in the prior action.

In light of the narrow restrictions to be placed on the privity requirement, one must consider whether offensive collateral estoppel is ever appropriate in a case when, as in *Hardy*, the defendants include both parties and nonparties to the prior litigation. In this situation, the trial court would have no real alternative but to bifurcate the trial between the estopped defendants and those yet to present their case. This process would undoubtedly "require more time and effort than applying collateral estoppel would save."[148] In addition, those defendants not estopped would be significantly prejudiced by the court's instruction that the other defendant's products had already been found to be defective. Because the goal of judicial economy would not be served and because unfairness would likely result, the better procedure would be to allow a full presentation by all defendants when this situation arises.

The second major issue confronted by the court in *Hardy* was the critical concept of identity of issue. Collateral estoppel may only be applied to identical, previously decided, issues that were essential to the prior judgment. This restriction usually requires the plaintiff, as between the prior and the current case, to show an identity of the product used, the defect claimed, and the relative position of the plaintiff.[149] The *Hardy* court noted

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[147] *See supra* text accompanying note 17.

[148] Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 545 (D. Minn. 1982); *see also* McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335, 339 (S.D. Miss. 1980) (bifurcation would be time-consuming, confusing to the jury and unfair to certain defendants).

[149] Weinberger, *Collateral Estoppel and the Mass Produced Product: A Proposal*, 15 NEW ENG. L. REV. 1, 25-26 (1979). The Weinberger article contains a thorough discussion of the application of collateral estoppel principles to products liability litigation in-

that the plaintiffs therein differed from the plaintiff in *Borel* with regard to product identity, time of exposure to asbestos, and knowledge of warnings.[150] Other possible differences include the type of work and working conditions involved, the types of illnesses claimed, and the degree to which the plaintiffs appreciated the warnings given them. While exact identity of factual circumstances between the prior and current case is not required in order for collateral estoppel to apply, there must be an identity of facts relating to the particular issue for which estoppel is sought.[151] Although individual variations in the plaintiffs' behavior such as misuse, contributory negligence, and assumption of risk do relate to the question of causation, which is unique to and must be litigated in each tort case, the potential for an unduly broad interpretation of the identity of issue requirement is sufficiently troubling to warrant treatment in proposed federal product liability legislation. The proposed "Product Liability Act"[152] provides that neither plaintiffs nor defendants may in-

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volving goods manufactured and sold in large quantities pursuant to a single design or formula. The author concludes that collateral estoppel should be applied only when the original case involved an intrinsic defect proven by empirical and precise evidence. *Id.* at 54-55.

[150] 681 F.2d at 344-45.

[151] Weinberger, *supra* note 147, at 25-26. The failure by plaintiffs to establish identity of issue is a primary reason for denial of offensive collateral estoppel in those jurisdictions that permit such use. *See, e.g.*, Williams v. Laurence-David, Inc., 271 Or. 712, 534 P.2d 173, 178 (1975) (plaintiff's failure to meet burden decisive). *Compare* Vincent v. Thompson, 50 A.D.2d 211, 377 N.Y.S.2d 118, 124-26 (App. Div. 1975) (finding no identity of issue with prior Quadrigen drug case) *with* Ezagui v. Dow Chem. Corp., 598 F.2d 727, 732-33 (2d Cir. 1979) (granting estoppel based on indentity of issue with prior Quadrigen case). The authors of the Restatement (Second) of Judgments offer four factors that are designed to assist in determining whether the issue sought to be estopped is identical to an issue in a prior judgment:

> [1] Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? [2] Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? [3] Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? [4] How closely related are the claims involved in the two proceedings?

RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment C (1982); *see also* Starker v. United States, 602 F.2d 1341, 1344-45 (9th Cir. 1979) (applying the Restatement factors).

[152] S. 2631, 97th Cong., 2d Sess. § 4(d)(1), (2) (1982). This bill was introduced by Senator Robert W. Kasten, Jr. on June 16, 1982 in an attempt to devise a uniform national approach to product liability law. A detailed summary of S. 2631 is provided in

voke collateral estoppel to bar litigation of an issue unless it is shown that the injury sustained occurred in the "same event" involved in the prior action. The effect of this provision would be to encourage the use of estoppel in mass disaster cases such as plane and train accidents but to limit its application in individual product defect actions, such as car-steering-mechanism-defect cases. In light of the dramatic impact that issue preclusion can have on a defendant's attempt to fully avail himself of the judicial process, this more restricted interpretation of the identity of issues requirement would appear to be warranted.

Just how dramatic an effect the prospect of offensive estoppel can have on a defendant's litigation efforts may be seen by analyzing the potential for settlement of mass tort claims. Defendants, traditionally interested in settling multiple plaintiff cases to avoid bad publicity and prohibitive legal costs, will undoubtedly have their concerns heightened by the prospect of an initial adverse decision that may estop them from litigating all issues other than proximate cause and damages. By settling the case and keeping the terms secret, defendants, in certain actions, may be able to avoid attracting scores of new plaintiffs drawn by the twin inducements of offensive estoppel and a large damages award.[153] But defendants who pursue this strategy after participating at trial should be wary: the Fifth Circuit in *Hardy* noted that defendants who settle after the trial has run its course but before the adverse judgment is actually entered may be deemed to have had a full and fair opportunity to litigate. Because settlement at this point would be directed almost entirely at avoiding the impact of offensive collateral estoppel in future cases, the court stated that collateral estoppel may be appropriate despite the settlement.[154]

Birnbaum and Wrubel, *Federal Product Liability Legislation: An Overview*, Nat'l L.J., August 9, 1982, at 26, col. 1.

[153] *See* Granelli, *supra* note 4, at 27 (discussing unsuccessful settlement attempt in Jeep roll-over case which resulted in $5.1 million bench verdict for plaintiff).

[154] 681 F.2d at 340-41. This danger already appears to have been realized in at least one case. In the Jeep case listed in note 153 *supra*, the Nevada state judge entered his verdict two hours after the attorneys in the case filed a stipulated notice of settlement to seemingly conclude the litigation, which had included a three-week trial. The judge stated that the defendant's desire to avoid bad publicity and the effects of collateral estoppel were not adequate to permit a settlement at that point. Granelli, *supra* note 4,

In reviewing the criteria set forth in *Parklane* and their application to asbestos litigation in *Hardy*, it is apparent that the Supreme Court's guidelines directly address the primary objections to offensive collateral estoppel. The criteria should serve to calm those who feared the unrestricted use of estoppel by plaintiffs once the mutuality requirement was removed. *Parklane* makes clear that fairness instead of mutuality now limits the application of collateral estoppel in federal courts. One shortcoming of the court's carefully structured test, however, may be that the fairness limitation will vary from court to court and from case to case. The district court's and Fifth Circuit's differing treatments of the prior inconsistent verdicts in *Hardy* reveal the extent to which the criteria are subject to manipulation.[155] Because each court exercises its discretion to determine whether estoppel would be unfair under the circumstances, a litigant cannot be certain of the future effect of a losing judgment because he has no way of knowing how the next court will judge fair-

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at 1, 27. The lower court's refusal to recognize the settlement was, however, later overturned by a unanimous Nevada Supreme Court. Jeep Corp. v. 2d Judicial Dist., No. 14001 (Nev. Oct. 29, 1982); *see* Nat'l L.J., Nov. 15, 1982, at 6, col. 4 (discussing appellate decision).

The whole question of strategy in the defense of a product liability action with an eye toward collateral estoppel is addressed in a recent article. The authors suggest that the defendant should select the best possible case to be tried initially, preferably one with an unusual fact situation and in a jurisdiction with no other pending suits of this type. Should the initial case be lost, the defendant should use discovery to establish dissimilarities between the two cases and to emphasize the uniqueness of the plaintiffs in terms of their knowledge, exposure, and injury. *See* Wheeler & Alee, *supra* note 125, at 19, cols. 1-3.

[155] In reaching its conclusion that prior verdicts in favor of the defendants should not bar the use of collateral estoppel by the plaintiff, the district court in *Hardy* relied on Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836 (E.D. Tex. 1980) and Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980). 509 F. Supp. at 1362. These cases held the previous defense verdicts had been based on the plaintiff's failure to adequately prove exposure or some other essential element and that, despite the inconsistent judgments, the precise issues sought to be estopped had never *themselves* been adversely determined. 488 F. Supp. at 841; 485 F. Supp. at 247-48. On appeal, the Fifth Circuit in *Hardy* first questioned the ability of the lower courts to make such a determination from the large number of litigated cases, and then reversed the lower courts' findings by citing at least one case in which the same issue involved had been decided favorably to the defendants. 681 F.2d at 346. It should be noted that, although the better course may be to analyze the prior decision to determine precisely how each *issue* was decided, *see* 485 F. Supp. at 248, the Supreme Court in *Parklane* spoke only of the existence of prior inconsistent *judgments*. 439 U.S. at 330-31.

ness.[156] A continuation of the type of careful and prudent administration of the guidelines as performed by the Fifth Circuit in *Hardy*, however, should mitigate significantly any problems of uneven application.

CONCLUSION

The offensive use of collateral estoppel in mass tort cases presents both special problems and unique opportunities. The problems result from the potential abuse of discretion granted each court in deciding such matters as identity of issues and effect of prior inconsistent judgments. The opportunities include the prospect of more efficient judicial administration and a significant reduction in litigation time and costs. The challenge to the bench and bar will be to avoid allowing the tempting nature of the opportunities to overshadow the significant dangers presented by the problems.

There are undoubtedly some cases in which offensive use is clearly appropriate and in which relitigation of issues would be without reason.[157] These situations occur more commonly in the mass accident area when all plaintiffs were simultaneously injured as a result of a common fact situation than in the area of mass produced products in which the only common element among plaintiffs is often the allegation of some degree of injury. Ever present in the application of collateral estoppel and res judicata should be the understanding that these doctrines must be used "not as clubs but as fine instruments"[158] and that a rigid application of the doctrines should be eschewed when injustice would result.[159] In light of this principle, it seems more sensible

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[156] Note, *supra* note 30, at 589-90.

[157] *See, e.g.*, Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 335, 337-38 (C.D. Cal. 1981) (determination of 12 consolidated cases in prior action was sufficient to cause offensive collateral estoppel to be applied to two later actions against the same defendant involving same airplane crash and same issues where plaintiffs could not have joined the earlier action).

[158] Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313, 1316 (5th Cir. 1970).

[159] *See* Garner v. Giarruss, 571 F.2d 1330, 1336 (5th Cir. 1978) (use of collateral estoppel or res judicata should not be rigidly applied when their use would result in manifest injustice); Brown v. Globe Tool & Eng'g Co., 337 So. 2d 894, 898-99 (La. App. 1976) (estoppel by judgment should be applied according to the demands of equity).

simply to insist on a stringent application of the fairness criteria outlined in *Parklane* for offensive use than to completely preclude offensive use on the ground that courts are incapable of applying the criteria as envisioned by the Supreme Court. In the end, though, despite the acknowledged evils of crowded dockets, delayed justice, and increased legal costs, it should be clear to all those entrusted with determining whether the application of offensive collateral estoppel is appropriate, that when considerations of judicial economy confront ideas of fairness and reasonable opportunity to litigate, the latter must, necessarily, prevail over the former.

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COMMENTS

MISSISSIPPI AND THE VOTING RIGHTS ACT: 1965-1982

Introduction

From 1965 to the highly publicized Indianola annexation suit in 1981,[1] the Voting Rights Act of 1965[2] (the Act) has had a significant effect on Mississippi, its political subdivisions, and its citizens. The positive results are well-known and often cited; the percentage of black Mississippians registered to vote has increased from 6.7% in the early 1960's to 72.2% in 1980,[3] and the number of black elected officials has risen from 29 in 1968 to 387 in 1980,[4] the highest number of any state.[5]

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[1] *See infra* notes 508-24 and accompanying text.

[2] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1976 & Supp. IV 1980)).

[3] U. S. Commission on Civil Rights, Political Participation app. VII, at 222-23 (1968). Prior to passage of the Act, only 28,500 blacks, or 6.7% of those eligible, were registered to vote in Mississippi. At the same time, 69.9% of the eligible whites were registered. *Id.* By 1980, 72.2% of voting age black Mississippians were registered compared to 85.2% of the eligible whites. *See Voting Rights Act: Report, together with Additional Views, of the Subcomm. on the Constitution to the Senate Comm. on the Judiciary on S. 1992*, 97th Cong., 2d Sess. 61 (1982) [hereinafter cited as *Report*]. Mississippi's percentage of minority registration in 1980 far exceeded the percentage in such non-covered jurisdictions as New York (46.5%), New Jersey (48.9%), and the District of Columbia (52.4%). *Id.*

[4] 10 Joint Center for Political Studies, National Roster of Black Elected Officials 7 (1980). In 1968, the number of black elected officials in Mississippi represented less than 1% of the total elected officials in the state; by 1980 they constituted 7.34%. *Id.* In 1980, Mississippi had the largest number of black mayors in the nation (17), the second largest number of black elected municipal officials (164), and the largest number of black judicial and law enforcement officials (78). *Id* at 14-15, 166-68.

[5] *Id* at 4-5. Louisiana had the second highest number of black elected officials in 1980 (363), followed by Illinois (298), Michigan (284), and the District of Columbia (261). *Id.* The number of black elected officials in states covered by the Act other than Mississippi and Louisiana were Alabama (238), Georgia (249), North Carolina (247), South Carolina (238), and Virginia (91). *Id.* at 7.

These improvements, however, have not been sufficient to remove Mississippi from the mandates of the Act. With the 1982 extension of the Act for another twenty-five years and the substantial change in its focus,[6] Mississippi and other covered jurisdictions will continue under special federal scrutiny. The purpose of this comment is to serve as a reminder to state and local officials of the requirements of the Act and the consequences of non-compliance. To that end, this comment is divided into four major sections: (1) a brief analysis of the Act, with particular emphasis on section 5, (2) a survey of litigation arising under the Act, (3) a catalogue of the 1982 changes to the Act, and (4) a review of the effect of the Act on Mississippi.

I. Congressional Response to Discriminatory Voting Practices

A. Pre-1965 Congressional Acts

Prior to the Act, Congress enacted three civil rights laws to implement the objectives of the fifteenth amendment. The Civil Rights Act of 1957[7] authorized the United States Attorney General to enjoin both public and private interference with the right to vote when the interference was based on race.[8] The Civil Rights Act of 1960[9] permitted states to be joined as defendants in voting rights suits, allowed the United States Attorney General to examine local voting records, and gave courts the power to register voters in areas of systematic racial discrimination.[10] Title I of the Civil Rights Act of 1964[11] provided for voting cases to be heard by three-judge courts and also prohibited the use of certain devices, including literacy tests, to disqualify blacks from voting in federal elections.[12] Although these three acts facilitated case-

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[6] See *infra* notes 172-98 and accompanying text for a discussion of the 1982 amendments to the Act. Several provisions of the Act are permanent and thus not subject to the 25-year extension. These permanent provisions include the ban on literacy tests, on poll taxes and discriminatory tests or devices, on laws against harassment and intimidation in the voting process, and the prohibition against denial or abridgement of voting rights on account of race or color. 42 U.S.C. §§ 1973, 1973a, 1973d-1973*l* (1976 & Supp. IV 1980).

[7] Civil Rights Act of 1957, Pub. L. No. 85-315, pt. IV, § 131, 71 Stat. 637 (codified at 42 U.S.C. § 1971 (1976)).

[8] 42 U.S.C. § 1971(c) (1976).

[9] Civil Rights Act of 1960, Pub. L. No. 86-449, tit. VI, § 601, 74 Stat. 90 (codified at 42 U.S.C. § 1971 (1976)).

[10] 42 U.S.C. § 1971 (1976).

[11] Civil Rights Act of 1964, Pub. L. No. 88-352, tit. I, § 101, 78 Stat. 241 (codified at 42 U.S.C. § 1971 (1976)).

[12] 42 U.S.C. § 1971(a)(2)(c), (g) (1976).

by-case litigation involving voting irregularities,[13] discriminatory voting practices continued unrelentingly. Techniques that were frequently used to bar minorities from voting in the early 1960's included racial gerrymandering,[14] "good character" tests, which were dependent solely upon a registrar's discretion,[15] and the unequal application of tests that required voting applicants to interpret a section of the federal or state constitution.[16]

B. Passage of the Act

Widespread resistance to both the spirit and the letter of the fifteenth amendment and the three acts passed to enforce it,[17] caused Congress to enact an "unusual, and in some aspects a severe, procedure"[18] to eradicate racial discrimination in voting.[19] Although all but two of the Act's sections apply to every state,[20] the controversial and

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[13] *See* South Carolina v. Katzenbach, 383 U.S. 301, 313 (1967).

[14] *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (Alabama law redefining city districts to remove 400 black voters, but removing no white voters, held violative of fifteenth amendment).

[15] *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 133 (1965).

[16] *See, e.g.*, Louisiana v. United States, 380 U.S. 145, 153 (1965).

[17] *See supra* notes 7-13 and accompanying text. In South Carolina v. Katzenbach, 383 U.S. 301 (1967), the Supreme Court noted that despite earnest efforts by the Justice Department and federal judges to enforce the voting rights laws, registration of voting-age blacks had increased in Alabama by only 5%, in Louisiana by 0.1%, and in Mississippi by 2%, and that white registration was approximately 50 percentage points greater than black registration in each of these three states. *Id.* at 313.

[18] Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969).

[19] South Carolina v. Katzenbach, 383 U.S. 301, 315 (1967).

[20] Sections 2, 3, and 6 through 14 of the '65 Act provide methods of enforcing the guarantees of the fourteenth and fifteenth amendments.

Section 2 broadly prohibits the denial or abridgement of the right to vote because of race, color, or membership in a minority language group. 42 U.S.C. § 1973 (1976). Section 3 authorizes a court to appoint federal examiners to enforce the guarantees of the fourteenth and fifteenth amendments and to suspend any "tests or devices" used to curtail the right to vote. *Id.* § 1973a (1976 & Supp. IV 1980).

Sections 6, 7, and 9 provide for the assignment of federal examiners to compile lists of qualified voting applicants to enable the applicants to vote in all elections. *Id.* §§ 1973d-1973e, 1973g. Section 8 authorizes the appointment of federal poll watchers in places where federal examiners have already been assigned. *Id.* § 1973f.

Section 10 facilitates constitutional litigation challenging the imposition of poll taxes for state and local elections. *Id.* § 1973h (1976). Sections 11 and 12 authorize civil and criminal sanctions against interference with the exercise of the rights guaranteed by the Act. *Id.* §§ 1973i-1973j.

Section 13 provides a method for terminating the compilation of voter lists by federal examiners upon a showing that over 50% of the eligible minority population is regis-

"unusual" nature of the Act is contained in sections 4[21] and 5,[22] which apply only to certain sections of the country.[23]

1. Section Four

Section 4(b)[24] provides the formula for determining which states and political subdivisions are subject to the preclearance requirements of section 5. These requirements apply to any state or political subdivision that met, as of November 1, 1964, two criteria.[25] First, the political entity must have utilized any "test or device" as a prerequisite to registering or to voting[26] that required a person to:

> (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.[27]

Second, the political entity must have had less than fifty percent of its voting age population either registered or voting in the November,

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tered to vote, that all persons listed by an examiner have been placed on the voter registration rolls, and that there is no longer reasonable cause to believe persons will be deprived of the right to vote because of race, color, or membership in a minority language group. *Id.* § 1973k (1976 & Supp. IV 1980).

Section 14 grants to the United States District Court for the District of Columbia or to any United States court of appeals jurisdiction to issue any declaratory judgment, restraining order, or temporary or permanent injunction provided for under the '65 Act. This section also provides rules regarding subpoena, attorney's fees, and cases of criminal contempt. *Id.* § 1973*l* (1976).

[21] *Id.* § 1973b (1976); *see infra* notes 24-43 and accompanying text.

[22] 42 U.S.C. § 1973c (1976); *see infra* notes 44-57 and accompanying text.

[23] The states and portions of states currently covered by sections 4 and 5, and the date used to determine coverage for each jurisdiction, are set forth in Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. § 51 app., at 464-65 (1981).

[24] 42 U.S.C. § 1973b (1976).

[25] The 1970 and 1975 amendments to the Act added November 1, 1968, and November 1, 1972, respectively, as dates from which any changed procedures were to be precleared before implementation. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400, 402, § 204, (codified as amended at 42 U.S.C. § 1973c (1976 & Supp. IV 1980)); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315, §§ 4-5 (codified as amended at 42 U.S.C. §§ 1973b, 1973c (1976 & Supp. IV 1980)).

[26] *Id.* § 1973b(b).

[27] *Id.* § 1973b(c).

1964, presidential election.[28] The first part of the test is determined by the United States Attorney General; the second part by the Director of the Census.[29] Neither determination is reviewable by any court.[30]

Section 4(a)[31] provides the only method by which political entities covered under section 4(b)[32] can come out from under the section 5 preclearance requirements. To "bail out," a covered entity must seek a declaratory judgment before a three-judge court in the United States District Court for the District of Columbia to the effect that during the preceding seventeen years it has not utilized any "test or device"[33] having the purpose or effect of racial discrimination in voting.[34]

If an entire state is subject to section 4(b), it may seek to bailout only if the bailout requirements have been met by every political subdivision within the state.[35] Conversely, as long as a state remains subject to preclearance requirements, a subdivision within that state may not seek independently to bail out, even though there has been no proscribed voting discrimination within that subdivision.[36] When specific political subdivisions within a state, rather than the entire state, are covered by section 4(b), each political subdivision so designated may independently bail out if it meets the bailout requirements.[37]

Since 1965, only one state, Alaska, has succeeded in bailing out.[38]

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[28] *Id.* § 1973b(b). Section 4(d) provides that no state or political subdivision will be included in § 4(b)'s coverage if (1) the proscribed tests or devices have been used only sparingly and have been effectively and promptly discontinued, (2) the continuing effects of their use have been eliminated, and (3) there is no reason to believe that their use will recur. *Id.* § 1973b(d).

[29] *Id.* § 1973b(b); *see* Briscoe v. Bell, 432 U.S. 404, 406-07 (1977).

[30] 42 U.S.C. § 1973b(b) (1976); *see* Briscoe v. Bell, 432 U.S. 404, 412 (1977).

[31] 42 U.S.C. § 1973b(a) (1976).

[32] Presently nine entire states as well as selected political subdivisions in 13 other states are covered under section 4(b). *See* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51 app., at 464-65 (1981).

[33] These " tests or devices," as defined in § 4(c), include literacy tests, interpretation tests, character tests, and tests requiring educational achievement or knowledge of some particular subject. 42 U.S.C. § 1973b(c) (1976); *see supra* text accompanying notes 26-27.

[34] 42 U.S.C. § 1973b(a) (1976). No declaratory judgment can be issued within 17 years from the date that any federal court determines that the proscribed tests or devices have been used *anywhere* within a covered state or a separately covered political subdivision. *Id.*

[35] *See* United States v. Board of Comm'rs, 435 U.S. 110, 127 (1978) ("state" covered by § 5 includes all political units within it). For a discussion of the "new" bailout requirements, see *infra* notes 183-92 and accompanying text.

[36] City of Rome v. United States, 446 U.S. 156, 167 (1980).

[37] 42 U.S.C. § 1973b(a) (1976).

[38] *See* City of Rome v. United States, 446 U.S. 156, 198 & n.8, 204 & n.15 (1980) (Powell, J., dissenting).

Alaska bailed out in 1966 and in 1971 but was re-covered by the 1970 and 1975 extensions of the Act.[39] One other state, Virginia, attempted to bail out but was unsuccessful.[40] In all, twenty-eight political subdivisions that were separately covered have bailed out. These include counties in Arizona, Idaho, New Mexico, North Carolina, and Oklahoma and municipalities in Maine.[41]

Under the 1982 amendments to the Act, major revisions have been made to section 4(a).[42] If section 4(a) had not been extended, Mississippi, as well as other covered states, could have filed for a declaratory judgment as early as 1982, presuming that none of the proscribed tests or devices had been used since 1965.[43]

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[39] *Id.*; *see supra* note 25.

[40] Virginia v. United States, 386 F. Supp. 1319, 1326 (D.D.C. 1974), *aff'd* 420 U.S. 901 (1975).

[41] *See* City of Rome v. United States, 446 U.S. 156, 198 & n.8 (1980) (Powell, J., dissenting).

[42] *See infra* notes 183-92 and accompanying text.

[43] *See Report*, *supra* note 3, at 55 (Assistant Attorney General Reynolds) (because the use of "no test or device" has been the sole determinant for the duration of the Act, a large number of jurisdictions could meet that test now).

In June 1965 the Mississippi Legislature, in a special session, repealed statutory and constitutional voter registration provisions that required a constitutional interpretation test, a complex application form, a good moral character test, and publication of the names of applicants in newspapers. *See* Act of June 30, 1965, ch. 12, 1965 Miss. Laws 36 (amending MISS. CODE § 3210 (1942) (simplifying voter application form)); Act of June 30, 1965, ch. 13, 1965 Miss. Laws 36 (amending MISS. CODE § 3212 (1942) (same)); Act of June 30, 1965, ch. 14, 1965 Miss. Laws 37 (amending MISS. CODE § 3212.5 (1942) (excluding requirement of good moral character)); Act of June 30, 1965, ch. 15, 1965 Miss. Laws 38 (repealing MISS. CODE § 3212.7 (1942) (required publication of names and addresses of prospective voters)); Act of June 30, 1965, ch. 16, 1965 Miss. Laws 38 (repealing MISS. CODE § 3213 (1942) (required voter to have knowledge of constitutional government and to possess proof of good moral character)).

The constitutional changes were ratified by Mississippi voters on August 17, 1965. The new registration law required only that prospective voters indicate their citizenship, age, and residence, their absence of felony convictions, and be able to read and write. Act of June 30, 1965, ch. 18, 1965 Miss. Laws 39 (amending MISS. CODE § 3235 (1942)); *see* United States v. Ramsey, 353 F.2d 650, 653 & nn.7-8 (5th Cir. 1965). Passage of the Act in August 1965 rendered the "ability to read and write" requirement ineffective. United States v. Mississippi, 256 F. Supp. 344, 347 (S.D. Miss. 1966).

Thus, under section 4(a)'s current bailout criteria Mississippi could apparently seek a declaratory judgment at least 17 years from the May 21, 1966, ruling in *United States v. Mississippi*, that is, any time after May 21, 1983.

2. *Section Five*

Section 5,[44] the heart of the Act, requires that a covered state or political subdivision[45] seek federal approval, or preclearance, before implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting"[46] different from that in effect in that state or political subdivision on November 1, 1964.[47] Any new voting law adopted by a covered political entity will be suspended until a review by federal authorities determines that the new law will not deny or abridge the right to vote because of race, color, or membership in a minority language group.[48]

A political entity can preclear voting laws by bringing an action before a three-judge court in the United States District Court for the District of Columbia, the only court with jurisdiction to hear a preclearance request,[49] for a declaratory judgment that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote because of race, color, or membership in a minority language group.[50] Alternatively, a political entity may submit a proposed change to the United States Attorney General and gain preclearance based on his failure to object within sixty days.[51] The At-

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[44] 42 U.S.C. § 1973c (1976).

[45] *See supra* notes 24-43 and accompanying text.

[46] 42 U.S.C. § 1973c (1976). This language in section 5 indicates the broad spectrum of changes covered by the Act. For a discussion of judicial interpretation of these words, see *infra* notes 75-124 and accompanying text.

[47] *See supra* note 25.

[48] 42 U.S.C. § 1973c (1976).

[49] United States v. Board of Supervisors, 429 U.S. 642, 646 (1977). The District of Columbia district court has exclusive jurisdiction to consider whether a proposed change is actually discriminatory. *Id.*

A declaratory judgment action brought by a private litigant claiming that a new state enactment is subject to § 5 does not have to be brought in the District of Columbia district court, but instead may be brought in a local district court. Allen v. State Bd. of Elections, 393 U.S. 544, 560 (1969).

[50] 42 U.S.C. § 1973c (1976). The declaratory judgment alternative has rarely been used, primarily because of the time involved and the distance between Washington, D.C., and the covered jurisdictions, as well as a general assumption that this alternative would be futile. *See* Keady & Cochran, *Section 5 of the Voting Rights Act: A Time for Revision*, 69 Ky. L.J. 741, 753 (1981). By 1980, only 23 suits for declaratory judgment had been filed by political entities, resulting in 10 published opinions. *See id.* at 754.

The lack of judicial review led Mississippi Senator Thad Cochran to introduce a bill extending the requirements of § 5 to the entire country with preclearance obtainable by a declaratory judgment action in the local United States district court. S. 1761, 97th Cong., 1st Sess., 127 Cong. Rec. S11,991 (1981).

[51] 42 U.S.C. § 1973c (1976). For a discussion of the United States Attorney General's

torney General's failure to object, however, or even an objection on his part to the proposed change, is not conclusive of the invalidity of the submitted change.[52] Compliance with either method of preclearance will not preclude a subsequent action to enjoin enforcement of the voting change. Once preclearance is obtained, however, a private party can attack the constitutionality of the change only through a traditional lawsuit.[53]

Although section 1 of the fifteenth amendment, as interpreted by the Supreme Court, proscribes only purposeful discrimination,[54] a political entity's change in voting laws must not have either a discriminatory purpose *or* a discriminatory effect in order to be precleared under section 5 of the '65 Act.[55] In upholding the constitutionality of the purpose or effect criteria of the preclearance requirements, the Supreme Court has noted that under section 2 of the fifteenth amendment[56] Congress may prohibit state action that does not violate section 1 of the fifteenth amendment but that does perpetuate the effects of past discrimination.[57]

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role, see *infra* notes 141-71 and accompanying text.

[52] Morris v. Gressette, 432 U.S. 491, 505 & n.21 (1977).

[53] Allen v. State Bd. of Elections, 393 U.S. 544, 549-50 (1967).

[54] In City of Mobile v. Bolden, 446 U.S. 55, 72-74 (1980), the Supreme Court indicated that a finding of intentional discrimination was necessary to establish a violation of the fifteenth amendment. Because the opinion lacked a majority, the issue has apparently not been settled. *See, e.g.*, Jordan v. City of Greenwood, 534 F. Supp. 1351, 1358 (N.D. Miss. 1982). *Compare* Lodge v. Buxton, 639 F.2d 1358, 1375 (5th Cir. 1981) (discriminatory purpose may be inferred from circumstantial evidence, an essential element of which is proof of government officials' unresponsiveness to the interests of the group claiming injury), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982) *with* McMillan v. Escambia County, 638 F.2d 1239, 1248-49 & n.18 (5th Cir. 1981) (proof of responsiveness of government officials is irrelevant to determining whether at-large system is adopted or maintained with a discriminatory purpose).

[55] 42 U.S.C. § 1973c (1976).

[56] Section 2 of the fifteenth amendment authorizes Congress to enact legislation to enforce the amendment's guarantees. U.S. CONST. amend. XV, § 2.

[57] City of Rome v. United States, 446 U.S. 156, 176 (1980). *Compare* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959) (literacy test that is fair on its face and is not employed in a discriminatory fashion does not violate § 1 of the fifteenth amendment) *with* South Carolina v. Katzenbach, 383 U.S. 301, 333-34 (1966) (per se ban on literacy tests under the Act is appropriate method of enforcing fifteenth amendment).

Furthermore, the Court has noted that "even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting," Congress could, under § 2 of the fifteenth amendment, prohibit changes in election procedures that are discriminatory in effect as an appropriate method of enforcing the amendment. City of Rome v. United States, 446 U.S. 156, 177 (1980). For a discussion of the 1982 amendments to section 2

C. Constitutionality of the Act

In *South Carolina v. Katzenbach*,[58] the Supreme Court upheld the constitutionality of the Act, noting that although the legislation represented "an uncommon exercise of congressional power,"[59] exceptional circumstances justified legislation that would otherwise be inappropriate. Summarizing these exceptional circumstances, the Court observed that Congress had determined that requiring case-by-case litigation for every incidence of voting discrimination had proven inadequate and ineffective to combat persistent discrimination in voting.[60] Individual lawsuits consumed an inordinate amount of time, and the results of even a favorable ruling were undone by states that merely devised new rules to perpetuate voting discrimination.[61] Thus, Congress shifted the burden of litigation from the victims of discrimination to the "perpetrators of the evil."[62]

There has been a certain misunderstanding as well as disgruntlement because only certain states and areas of the country have been singled out for intensive enforcement of the fifteenth amendment when discrimination against minorities occurs in parts of the country not covered by the Act.[63] This selective coverage exists because the enforcement features of the Act are aimed at those states and areas that have used certain devices, such as literacy tests and interpretation tests, to discourage participation by minorities in the electoral process.[64] The Act specifically prohibits further use of these tests or de-

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see *infra* notes 173-82 and accompanying text.

[58] 383 U.S. 301 (1966).

[59] *Id.* at 334.

[60] *Id.* at 328. Previous congressional enactments had facilitated case-by-case litigation. *See supra* text accompanying note 13.

[61] 383 U.S. at 334-35.

[62] *Id.* at 328.

[63] *See* Keady & Cochran, *supra* note 30, at 741, 767-69 (President Ford and Congressional leaders recommended extension of Act to entire country because of discrimination in voting); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 586 (1969) (Harlan, J., concurring and dissenting) (it is difficult to believe that a small number of states would be singled out by Congress as requiring stricter federal scrutiny for what may be just as serious a problem in parts of the North); *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, House of Representatives*, 97th Cong., 1st Sess. 3 (1981) (statement of Rep. Henry Hyde) [hereinafter cited as *Hearings*] (selective application of preclearance should be ended because voting abuses can and doubtless will recur, not just in the South but anywhere in the country); UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 15-16 (1975) (voting discrimination is not limited to the South).

[64] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969); South Carolina v.

vices.[65] To ensure that no subtle, invidious methods of voting discrimination replaced the specifically prohibited methods,[66] those states and areas that had both used the proscribed tests or devices *and* had a low percentage of its voting age population either registered or voting in the presidential election[67] were precluded from making any changes in voting procedures without first having them precleared.[68] Thus, if a state or area either used discriminatory methods other than the proscribed tests and devices, or had a high percentage of its eligible population registered or voting, the preclearance feature of section 5 would not be applicable, and traditional fourteenth and fifteenth amendment litigation would be the basis by which to eliminate discrimination.[69]

In upholding the confinement of remedies to such a small number of states and political subdivisions, the Court in *South Carolina v. Katzenbach* noted that Congress had reliable evidence of actual voting discrimination in a majority of the covered areas.[70] Furthermore, the Court declared that the coverage formula's focus on the use of proscribed tests or devices for voter registration and a low percentage of the eligible population participating in the electoral process was pertinent to both voting discrimination and widespread disfranchisement.[71]

The Court also pointed out that the states for which there was evidence of actual voting discrimination shared two characteristics: (1) the states used tests or devices for voter registration, and (2) the percentage of eligible voters voting in the 1964 presidental election was at least twelve points below the national average.[72] The Court dismissed as irrelevant the formula's exclusion of certain states and political subdivisions in which there was evidence of voting discrimination because "legislation need not deal with all phases of a problem in the same way

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Katzenbach, 383 U.S. 301, 330 (1966).

[65] 42 U.S.C. § 1973b (1976).

[66] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1979); South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966).

[67] 42 U.S.C. § 1973b(b) (1976); *see supra* notes 25-30 and accompanying text.

[68] 42 U.S.C. § 1973c (1976).

[69] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 58 (1980) (fourteenth and fifteenth amendment challenge to at-large city council elections); Dunn v. Blumstein, 405 U.S. 330, 331 (1972) (fourteenth amendment challenge to durational residence requirement for voter registration).

[70] 383 U.S. at 334-35.

[71] *Id.* at 328.

[72] *Id.* at 329. The Court observed that Alabama, Mississippi, and Louisiana had repeatedly been cited for substantial voting discrimination and that more than "fragmentary" evidence of recent voting discrimination had been found in South Carolina, Georgia, and parts of North Carolina. *Id.* at 329-30.

as long as the distinctions drawn have some basis in practical experience."[73] The Court further noted that a state or political subdivision could bail out from the section 5 preclearance requirements if no substantial voting discrimination had materialized during the preceding five years.[74]

II. Litigation Under the Act

Today, the parameters of sections 4 and 5 are relatively clear. But that has not always been the case. Each succeeding year after *South Carolina v. Katzenbach*, the Court has further clarified the scope and operation of these two important sections. These clarifications have been in three major areas: (1) the voting changes covered by the Act; (2) the scope of inquiry by a three-judge court; and (3) the nature and scope of the United States Attorney General's role.

A. Actions Covered

Because the "Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations"[75] that deny citizens the right to vote because of race, the Supreme Court has declared its intention to give section 5's coverage the broadest possible interpretation.[76] The initial question under the Act is not whether the change is discriminatory but whether the change has the slightest potential to affect voting;[77] thus,

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[73] *Id.* at 330. Because of its relevancy to voting discrimiation, the coverage formula described in § 4(b) was upheld as rational in both theory and practice. *Id.*

[74] *Id.* at 331. The five year period has been increased to nineteen years. Voting Rights Act Amendments of 1982, Pub. L. 97-205, § 2(a), 96 Stat. 131.

Fourteen years later, in City of Rome v. United States, 446 U.S. 156 (1980), Justice Powell reminded the Court of this statement. In his dissent from the *Rome* Court's ruling that individual political subdivisions within a state covered by § 4(b) could not separately bail out, Justice Powell contended that if the constitutional safety valve provided through the bailout feature was not available to all covered entities, Congress had overstepped the limits of its authority under the fifteenth amendment. *Id.* at 200-02.

[75] Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969); *see also* Georgia v. United States, 411 U.S. 526, 531 (1973) (§ 5 concerned with reality of changed practices as affecting black voters rather than simple inventory of voting procedures).

[76] Allen v. State Bd. of Elections, 393 U.S. 544, 565-66 (1969). *But cf.* United States v. Saint Landry Parish School Bd., 601 F.2d 859, 865 (5th Cir. 1979) (§ 5 not designed or intended to provide sanctions for every fraudulent election; change in voting procedure must be more than isolated instance of bargaining for votes).

[77] *See* Georgia v. United States, 411 U.S. 526, 534 (1973). An action before a three-judge court is solely for the purpose of deciding whether the proposed change affects voting, and if so, whether it has been properly precleared. Only the District of Columbia district court or the United States Attorney General can determine whether a proposed

even the most innocuous change in any "voting qualifications or prerequisites to voting, or standard, practice or procedure"[78] must be precleared prior to its enactment or administration.[79] Furthermore, a state is not exempt from the preclearance provisions merely because its legislation was passed in an attempt to comply with the Act.[80]

Allen v. State Board of Elections[81] involved the application of the Act to four separate changes in state election laws and regulations.[82] One change considered by the Court was a Mississippi law that allowed

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change has a discriminatory purpose or a discriminatory effect. Allen v. State Bd. of Elections, 393 U.S. 544, 558-59 (1969); *see infra* notes 129-39 and accompanying text.

[78] 42 U.S.C. § 1973c (1976). Depending on when a jurisdiction became subject to the Act, the preclearance requirement covers any voting changes instituted after November 1, 1964, November 1, 1968, or November 1, 1972. *Id.; see supra* note 25. Voting qualifications or procedures instituted prior to the applicable date are not subject to § 5 review. Beer v. United States, 425 U.S. 130, 138 (1976).

[79] 42 U.S.C. § 1973c (1976); *see* Briscoe v. Bell, 432 U.S. 404, 410 n.9 (1977); Georgia v. United States, 411 U.S. 526, 538 (1973); Perkins v. Matthews, 400 U.S. 379, 395-96 (1971).

Requiring states to obtain approval *prior* to enacting or implementing any new voting statute has been severely criticized. Justice Black, concurring and dissenting in South Carolina v. Katzenbach, 383 U.S. 301 (1967), noted that requiring states to seek approval from federal authorities before a local law could become effective would create the impression that "states treated in this way are little more than conquered provinces." *Id.* at 360. Justice Black's sentiments have been reiterated by other Justices and federal court judges. *See, e.g.*, McDaniel v. Sanchez, 452 U.S. 130, 153 (1981) (Powell, J., concurring); Allen v. State Bd. of Elections, 393 U.S. 544, 585 (1969) (Harlan, J., concurring and dissenting).

Echoing Justice Black's earlier dissents in Perkins v. Matthews, 400 U.S. 379, 401-09 (1971), Allen v. State Bd. of Elections, 393 U.S. 544, 595-97 (1969), and South Carolina v. Katzenbach, 383 U.S. 301, 355-62 (1967), a three-judge court in Mississippi composed of Judge Charles Clark of the Fifth Circuit Court of Appeals and Mississippi district court Judges Russell and Nixon expressed frustration with § 5:

> This Section 5 imposes a prior restraint upon certain of the sovereign States by enjoining the enforcement of statutes they may enact until they can convince federal judges of a district foreign to their soil that these presumptively valid acts of their duly elected legislature pass Constitutional muster, or until their chief legal officer has submitted such statutes to a political appointee of the Executive Department . . . for his review and tacit approval.

Evers v. State Bd. of Election Comm'rs, 327 F. Supp. 640, 641 (S.D. Miss. 1971), *appeal dismissed*, 405 U.S. 1001 (1972). Because it was bound to follow Supreme Court precedent, the three-judge court applied § 5 "as if we considered it to have pristine authority." *Id.*

[80] Allen v. State Bd. of Elections, 393 U.S. 544, 565 n.29 (1969).

[81] 393 U.S. 544 (1969).

[82] Four cases had been consolidated on appeal; three of these cases were before the Court on direct appeal from the Southern District of Mississippi and the fourth had been appealed from the Eastern District of Virginia. *Id.* at 547-53.

county boards of supervisors to be elected at large.[83] Supervisors had previously been elected from districts within the counties. The Court held that this law was subject to section 5 preclearance because the right to vote could be diluted by at-large voting.[84] Because minority voters might constitute a majority in one district but a minority in the county as a whole, the change could nullify their ability to elect a candidate of their choice.[85]

A second state action that the *Allen* Court considered was the changing of an elective office to an appointive one. Prior to 1966, county superintendents of education in Mississippi could either be elected or appointed; a 1966 law required that they be appointed.[86] The Court found that this change affected citizens' voting power because they could no longer elect an official formerly subject to the voters' approval.[87] Although this change might have been made without either a discriminatory purpose or a discriminatory intent, it nevertheless required preclearance.[88] Another 1966 Mississippi law challenged in *Allen* changed the requirements for independent candidates by advancing the filing deadline twenty days, by increasing the number of signatures needed for a qualifying petition, and by prohibiting any person who had voted in a primary election from running as an independent.[89] Because these changes made it more difficult for an independent candidate to get on the ballot, the Court reasoned that they should be precleared even though they might not have had a discriminatory purpose or discriminatory effect.[90] The fourth state law the Court confronted in *Allen* involved the casting of write-in votes. In an attempt to modify a requirement that all write-in ballots be made in a voter's own handwriting, the Virginia Board of Elections authorized

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[83] Act of May 27, 1966, ch. 290, 1966 Miss. Laws 374 (amending MISS. CODE § 2870 (1942)), *repealed by* Act of April 29, 1980, ch. 425, § 5, 1980 Miss. Laws 796.

[84] 393 U.S. at 566.

[85] *Id.* at 550.

[86] Act of June 17, 1966, ch. 406, 1966 Miss. Laws 744 (amending MISS. CODE § 6271-08 (Supp. 1966)), *amended by* Act of April 1, 1970, ch. 372, 1970 Miss. Laws 455 (current version at MISS. CODE ANN. §§ 37-5-61 to -75 (1972 & Supp. 1981)).

[87] 393 U.S. at 569-70.

[88] *Id.* at 550-51, 569-70.

[89] Act of June 15, 1966, ch. 614, 1966 Miss. Laws 1248 (amending MISS. CODE § 3260 (1942)), *repealed by* Act of March 27, 1978, ch. 429, § 3, 1978 Miss. Laws 669 (current version at MISS. CODE ANN. § 23-5-134 (Supp. 1982)). Section 23-5-134 will be changed on January 1, 1983, if it is effectuated under § 5 of the Act.

[90] *Id.* at 551, 570; *see* Waide v. Waller, 402 F. Supp. 922, 925 (N.D. Miss. 1975) (law requiring more stringent qualifications for political candidacy held subject to preclearance).

election judges to aid any qualified voter who was unable to mark a ballot because of illiteracy.[91] Voters were not allowed to vote for a write-in candidate by sticking labels with the candidate's name on the ballot.[92] Because the new procedure differed from the procedure in effect at the time Virginia became subject to the Act, the Court held that it had to meet the preclearance requirements before being enforced.[93]

Various other changes in state election laws have been considered by the Supreme Court regarding whether the changes require preclearance before being enforced. In *Hadnott v. Amos*,[94] the Court was confronted with a 1967 Alabama law that required independents to file a declaration of intent to become a candidate by the same time that party candidates declared their candidacies.[95] Declaring that the law increased the barriers placed on independent candidates,[96] the Court held that the law was subject to section 5 preclearance and that new elections were required in one county where the independent candidates had been left off the ballot.[97]

Changes in the location of polling places, as well as municipal boundary changes through annexation, were at issue in *Perkins v. Matthews*.[98] Noting that the accessibility, prominence, and prior notice of the location of polling places all affect a person's ability to exercise his franchise, the Court held that any change in a polling location must be precleared prior to the use of the new location.[99]

Similarly, the Court found that revising municipal boundary lines could affect voting by determining who could and could not vote in city elections, as well as by diluting the weight of the votes of those citizens in the pre-annexation area.[100] Reiterating that section 5 was designed to cover changes that have a potential for racial discrimination in voting, the Court noted that this potential exists in annexation, which changes the composition of the electorate.[101] Therefore, the annexations had to be precleared.[102]

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[91] 393 U.S. at 581-82 app.

[92] Allen v. State Bd. of Elections, 268 F. Supp. 218, 219 (E.D. Va. 1967), *vacated*, 393 U.S. 544 (1969).

[93] 393 U.S. at 552-53, 570.

[94] 394 U.S. 358 (1969).

[95] ALA. CODE, tit. 17, § 274 (1958) (current version at ALA. CODE § 17-22-5 (1975)).

[96] 394 U.S. at 365-66.

[97] *Id.* at 361, 365-67.

[98] 400 U.S. 379 (1971).

[99] *Id.* at 387-88.

[100] *Id.* at 388.

[101] *Id.* at 388-89.

[102] *Id.*

The Court in *Georgia v. United States*[103] determined that a state reapportionment plan required preclearance before it could be enforced. Following the 1970 census, the Georgia Legislature reapportioned the districts for both houses of the state legislature as well as for the federal congressional districts.[104] The plans were submitted to the United States Attorney General for preclearance under section 5. After the Attorney General objected to the plan for the state House of Representatives, the legislature immediately enacted a new reapportionment plan.[105] The Attorney General again objected to the plan, and when Georgia decided not to enact another plan, the Attorney General filed suit under section 5.[106] Although the state had used multi-member districts in the prior legislative plan, the Supreme Court found that the extensive reorganization of voting districts substantially changed previous election law, rendering the reapportionment plan subject to preclearance under section 5.[107]

In *Berry v. Doles*,[108] the Court dealt with a state statute that staggered the terms of elected officials. Under a 1964 Georgia law, the three members of the Peach County Board of Commissioners were to be elected every four years.[109] A 1968 amendment changed this law, providing for staggered terms for the single at-large commissioner.[110] Because this amendment constituted a change in voting procedures, the statute was subject to preclearance.[111]

In *Dougherty County Board of Education v. White*,[112] the issue was whether a rule governing leave for employee-candidates constituted a voting practice or procedure within the meaning of section 5 and whether a county school board was a "political subdivision" within the scope of the Act.[113] The Court answered both questions affirmatively.[114]

In *White*, a black employee of the Doughtery County Board of Education became a candidate for the Georgia Legislature in 1972. Less than a month later the Board adopted a personnel policy that required

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[103] 411 U.S. 526 (1973).
[104] *Id.* at 528.
[105] *Id.* at 528-30.
[106] *Id.* at 530.
[107] *Id.* at 531.
[108] 438 U.S. 190 (1978) (per curiam).
[109] *Id.* at 190-91.
[110] *Id.*
[111] *Id.* at 190-92.
[112] 439 U.S. 32 (1978).
[113] *Id.* at 34.
[114] *Id.* at 44-47.

any employee seeking elective office to take a leave of absence without pay.[115] No school board employee had sought office prior to 1972.[116] After taking three different leaves of absence, the employee filed suit claiming that the Board's personnel policy was a "practice or procedure with respect to voting" and thus subject to preclearance.[117] The district court enjoined enforcement of the rule pending compliance with section 5's preclearance requirements.[118]

On appeal, the Supreme Court observed that by imposing economic hardships on employees who sought elective office, the Board's personnel policy placed a burden on potential candidates and limited the voters' choices.[119] Accordingly, the actions by the Board were covered because section 5 was intended to cover *all* potentially discriminatory changes by political entities; whether the political entity has some nominal electoral function is irrelevant.[120] For the most part, therefore, any change that has even the slightest effect on voting, registration, or candidacy must be precleared before it may become effective.[121]

In addition to the above changes in state election laws and regulations, certain activities of political parties are also subject to section 5 preclearance.[122] These include changes in the conduct of primary elec-

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[115] *Id.* at 34.

[116] *Id.* at 35.

[117] *Id.* at 34-35.

[118] *Id.* at 36.

[119] *Id.* at 40.

[120] *Id.* at 45. *But see* Jordan v. Cagle, 474 F. Supp. 1198, 1209 (N.D. Miss. 1979) (school board personal leave policy upheld when related to facially neutral personnel practice and imposed no constraint on employee political activity), *aff'd*, 620 F.2d 298 (5th Cir. 1980).

[121] For examples of changes provided by the Department of Justice, see generally Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.12 (1981).

[122] *Id.* § 51.7; *see, e.g.*, Sumter County Democratic Exec. Comm. v. Dearman, 514 F.2d 1168, 1170 (5th Cir. 1975) (change in certification procedure subject to § 5 preclearance); Thompson v. Brown, 434 F.2d 1092, 1095 (5th Cir. 1970) (changes in tribunal that hears election challenges must be precleared); Jackson v. Riddell, 476 F. Supp. 849, 858 (N.D. Miss. 1979) (amendment to statute, which allows injunction against person claiming to be member of county Democratic executive committee without having been lawfully elected or chosen, ineffective until preclearance obtained); Crowe v. Lucas, 472 F. Supp. 937, 944 (N.D. Miss. 1979) (new law affecting registration of voters must be precleared); Evers v. State Bd. of Election Comm'rs, 327 F. Supp. 640, 642 (S.D. Miss. 1971) (laws affecting manner of conducting state elections are subject to § 5), *appeal dismissed*, 405 U.S. 1001 (1972). *But see* Riddell v. National Democratic Party, 508 F.2d 770, 774 n.4 (5th Cir. 1975) ("Loyalist" faction's changing times and places of precinct voting for county delegates not violative of the Act because state denied them opportunity to conduct regular precinct voting).

tions at which party nominees, party convention delegates, or party officials are chosen.[123] Changes in the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to preclearance.[124]

Determining whether reapportionment plans are subject to section 5 preclearance has caused problems for trial courts as well as for the Supreme Court.[125] The problem arises because a federal court may create its own reapportionment plan utilizing different guidelines and procedures from the normal plan drawn by a legislative body.[126] A true court plan is not subject to section 5 preclearance;[127] however, a reapportionment plan submitted to a court in response to a court order that has declared the existing apportionment unconstitutional is subject to section 5, and therefore must be precleared.[128]

B. Role of the Courts

The role of various federal courts in enforcing the Act has spawned litigation even though *Allen v. State Board of Elections*[129] clearly delineated the methods by which suits could be brought under section 5 and the scope of each court's inquiry.[130] There are three categories of potential plaintiffs under the '65 Act. First, any state or polit-

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[123] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.7 (1981).

[124] *Id.*

[125] *Compare* Wise v. Lipscomb, 437 U.S. 535, 542 (1978) (plans imposed by court order are not subject to § 5) *and* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 n.6 (1976) (court-ordered plans resulting from equitable jurisdiction over adversary proceedings not subject to § 5) *and* Conner v. Johnson, 402 U.S. 690, 691 (1971) (district court decree not within reach of § 5) *and* United States v. Board of Supervisors, 571 F.2d 951, 953 (1978) (court-ordered reapportionment not subject to the Act) *with* McDaniel v. Sanchez, 452 U.S. 130, 146 (1981) (reapportionment plan, enacted in response to federal court order does not change its character as a legislative plan) *and* Connor v. Finch, 431 U.S. 407, 412 (1977) (reapportionment plan enacted by state after prior plan invalidated by federal court not effective until precleared) *and* Wyche v. Madison Parish Police Jury, 635 F.2d 1151, 1163 (5th Cir. 1981) (reapportionment required by 1980 census figures subject to § 5).

[126] A legislative plan may utilize multi-member districts and may have greater population disparities than are permitted under a court-ordered plan. Connor v. Finch, 431 U.S. 407, 414-15 (1977). A court-ordered plan, absent persuasive justifications to the contrary, must utilize single member districts and must create districts with little more than de minimus population variations. Chapman v. Meier, 420 U.S. 1, 26-27 (1975).

[127] Georgia v. United States, 411 U.S. 526, 534 n.6 (1973).

[128] Canton NAACP v. City of Canton, 472 F. Supp. 859, 865 (S.D. Miss. 1979).

[129] 393 U.S. 544 (1969).

[130] *Id.* at 548-72.

ical subdivision required under section 4(b) to preclear voting changes may seek a declaratory judgment before a three-judge court in the United States District Court for the District of Columbia.[131] In this situation, the question to be resolved by the court is whether the proposed voting change has the purpose or the effect of denying or abridging the right to vote because of race, color, or membership in a minority language group.[132]

Second, a private litigant, usually a voter or a potential candidate for office in a "covered jurisdiction," may bring suit for a declaratory judgment and for injunctive relief, alleging that a proposed or recently enacted voting change is covered by section 5 but has not been precleared.[133] The *sole* question to be resolved in this type of action is whether the change is covered by section 5, and if so, whether the change has been precleared.[134] If the change is one that should have been precleared but has not been, the court can enjoin the political entity from enacting or making further use of the change until preclearance has been obtained.[135]

Finally, the United States Attorney General may seek an injunction against the covered entity to prohibit enforcement of a new regulation because of the entity's failure to gain approval under section

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[131] *See, e.g.*, Mississippi v. United States, 490 F. Supp. 569, 571 (D.D.C. 1979); City of Rome v. United States, 472 F. Supp. 221, 223 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980).

[132] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 558 (1969).

[133] *See, e.g.*, Perkins v. Matthews, 400 U.S. 379, 381-83 (1971); Evers v. State Bd. of Election Comm'rs, 327 F. Supp. 640, 640 (S.D. Miss. 1971); Mississippi Freedom Democratic Party v. Johnson, 299 F. Supp. 93, 94 (S.D. Miss. 1969); Whitley v. Johnson, 296 F. Supp. 754, 754 (S.D. Miss.), *rev'd sub nom.* Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

The Act does not expressly allow a private party to seek a declaratory judgment or to obtain an injunction. Nevertheless, because the Act provides that a person shall not be denied the right to vote for failing to comply with any new state law that is covered by, but not approved under, § 5, an individual may pursue both a declaratory judgment and an injunction. Allen v. State Bd. of Elections, 393 U.S. at 554-55.

[134] Allen v. State Bd. of Elections, 393 U.S. 544, 558-59 (1969); *see* Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 766 (N.D. Miss. 1978).

[135] Allen v. State Bd. of Elections, 393 U.S. 544, 555 (1969). Either the United States or a private litigant may seek to enjoin the enforcement of a new regulation because of the political entity's failure to obtain § 5 approval. *Id.* at 561; *see* Oden v. Brittain, 396 U.S. 1210, 1210-11 (Black, Circuit Justice, 1969) (Circuit Justice alone had no authority to enjoin election); Heggins v. City of Dallas, 469 F. Supp. 739, 739-40 (N.D. Tex. 1979) (private citizens sought to enjoin city from conducting city council elections until the new election plan was precleared); Charlton County Bd. of Educ. v. United States, 459 F. Supp. 530, 536 (D.D.C. 1978) (district court refused to enjoin primary election).

5.[136] The issue for the court to resolve in such an action is the same as that involved when the plaintiff is a private litigant, that is, whether the voting change is covered by section 5, and, if so, whether it has been precleared.[137]

In the second and third types of litigation the case is heard before a local three-judge district court in the appropriate jurisdiction,[138] but the court is precluded from ruling on the substantive issue of whether the change has the purpose or the effect of racial discrimination in voting. This substantive determination may only be made by either the District of Columbia district court or the Attorney General.[139] Appeals in each of the three types of actions may be made directly to the United States Supreme Court.[140]

C. Role of the United States Attorney General

Because section 5 requires covered jurisdictions to delay implementation of validly enacted legislation until it has been subjected to federal scrutiny,[141] Congress, in order to provide an expeditious method of preclearance, allows these covered entities to submit their proposed voting changes to the United States Attorney General.[142] Proposed changes must be submitted directly to the Attorney General in some unambiguous and recordable manner; it is not enough that the Attorney General is merely made aware of the changes.[143]

Under this alternative, preclearance is final if the Attorney General fails to object to the change within sixty days.[144] The sixty-day period begins to run when the Department of Justice receives a properly prepared submission.[145] This sixty-day period refers to sixty calen-

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[136] Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969); *see, e.g.*, United States v. Board of Comm'rs, 435 U.S. 110, 116 (1978); United States v. Board of Supervisors, 429 U.S. 642, 643 (1977) (per curiam); United States v. Board of Supervisors, 571 F.2d 951, 952 (5th Cir. 1978).

[137] United States v. Board of Supervisors, 429 U.S. 642, 645-46 (1977) (per curiam); Perkins v. Matthews, 400 U.S. 379, 383 (1971); *see supra* text accompanying note 134.

[138] Allen v. State Bd. of Elections, 393 U.S. 544, 560-61 (1969).

[139] Perkins v. Matthews, 400 U.S. 379, 385 (1971).

[140] Allen v. State Bd. of Elections, 393 U.S. 544, 561-63 (1969); *see* Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978).

[141] *See* Morris v. Gressette, 432 U.S. 491, 501-02 (1977).

[142] 42 U.S.C. § 1973c (1976).

[143] Allen v. State Bd. of Elections, 393 U.S. 544, 571 (1969).

[144] 42 U.S.C. §§ 1973c (1976).

[145] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.8(b) (1981).

dar days excluding the day the submission is received.[146] If the sixtieth day is not a regular business day for the Justice Department, the Attorney General has until the close of the next full business day to interpose an objection.[147] The official date of the Attorney General's response is the day the reply is mailed to the submitting entity.[148] If necessary, the submitting authority may request expedited consideration by noting the reason the consideration is needed and by providing the date by which a determination is required.[149]

Each submission by a covered entity must satisfy the enumerated requirements of the administrative rules formulated by the Attorney General's office.[150] These administrative rules provide for the manner in which a submission is to be addressed,[151] and also require that the source of any information be identified, that the person making estimates and his basis be identified, and that any relevant information not available or applicable be stated.[152]

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[146] *Id.* § 51.8(c).

[147] *Id.*

[148] *Id.*

[149] *Id.* § 51.32.

[150] *See* Georgia v. United States, 411 U.S. 526, 539 (1973). These administrative rules are embodied in Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. §§ 51.1-51.54 (1981). Because the Attorney General's office did not receive specific guidance from the Act, it formulated these rules to govern its § 5 responsibilities. *See* Georgia v. United States, 411 U.S. at 536; Comment, *Section 5: Growth or Demise of Statutory Voting Rights?*, 48 MISS. L.J. 818, 842 (1977).

[151] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.22 (1981).

[152] *Id.* § 51.24. Additionally, the administrative rules require that the following information or documents be included in each submission:

> (a) A copy of any ordinance, enactment, order or regulation embodying a change affecting voting.
>
> (b) If the change affecting voting is not readily apparent on the face of the document provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.
>
> (c) The name, title, address, and telephone number of the person making the submission.
>
> (d) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.
>
> (e) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.
>
> (f) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council,

The administrative regulations indicate that certain supplemental information will facilitate the review process and should be provided where pertinent. This information includes demographic information, maps, election returns, language usage, publicity and participation, and minority group contacts.[153]

If the Attorney General requests additional information,[154] the sixty-day period begins anew upon receipt of the requested data.[155] In explaining the rationale behind this rule, the Supreme Court noted in

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administrative decision by registrar).

(g) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

(h) The date of adoption of the change affecting voting.

(i) The date on which the change is to take effect.

(j) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(k) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

(l) A statement of the reasons for the change.

(m) A statement of the anticipated effect of the change on members of racial or language minority groups.

(n) A statement identifying any past or pending litigation concerning the change or related voting practices.

(o) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in § 51.26 and is most likely to be needed with respect to redistricting, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in § 51.35.

Id. § 51.25.

[153] *Id.* § 51.26; *see infra* text accompanying notes 159-60.

[154] The Attorney General *shall* request further information if the submission does not satisfy the requirements of 28 C.F.R. § 51.25; *see supra* note 152. The additional information must be provided no later than 60 days following receipt of the original submission. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.35(a) (1981). If the requested information is not provided within the 60 days the Attorney General may object to the change absent extenuating circumstances. *Id.* § 51.38.

[155] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.35(a).

Georgia v. United States[156] that "if the Attorney General were denied the power to suspend the sixty-day period until a complete submission were tendered, his only plausible response to an inadequate or incomplete submission would be simply to object to it," which would only add acrimony to the administration of section 5.[157] But the Court warned that it would not condone any conduct by the Justice Department that utilized the suspension provision to repeatedly or frivolously delay the execution of a covered entity's important laws.[158]

Furthermore, if the submitting entity chooses to supplement its original submission with additional information the sixty-day period begins anew upon the Justice Department's receipt of the new data.[159] Because the Attorney General may request additional information in reviewing the submission, the supplemental information provided for in the administrative rules should be included in the original submission in order to expedite the process.[160] The Attorney General's right to request additional information is not without limitation. The Attorney General may not use the additional information request procedure to postpone the commencement of the sixty-day period more than once.[161] After receiving the additional information, the Attorney General may request other information only during the sixty-day period that commenced upon receipt of the first requested data.[162]

If the Attorney General fails to make a timely objection, the voting law change is precleared and may be enforced by the covered jurisdiction.[163] The Attorney General's failure to object is not subject to judicial review.[164] He is not required to state affirmatively that the change

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[156] 411 U.S. 526 (1973).

[157] *Id.* at 540-41; *see* City of Rome v. United States, 446 U.S. 156, 171 (1980).

[158] 411 U.S. at 541 n.13.

[159] City of Rome v. United States, 446 U.S. 156, 171 (1980).

[160] *See supra* text accompanying note 153.

[161] Garcia v. Uvalde County, 455 F. Supp. 101, 104 (W.D. Tex. 1978), *aff'd*, 439 U.S. 1059 (1979).

[162] Garcia v. Uvalde County, 455 F. Supp. 101, 105 (W.D. Tex. 1978), *aff'd*, 439 U.S. 1059 (1979).

[163] 42 U.S.C. § 1973c (1976); *see* Morris v. Gressette, 432 U.S. 491, 502 (1977); 28 C.F.R. § 51.41 (1981). *But see* Evers v. State Bd. of Election Comm'rs, 327 F. Supp. 640, 643 (S.D. Miss. 1971) (three-judge court) (state election changes not precleared when Attorney General notified state of inability to determine validity of changes 60 days after receipt of submission), *appeal dismissed*, 405 U.S. 1001 (1972).

[164] Harris v. Bell, 562 F.2d 772, 773-74 (D.C. Cir. 1977).

In Morris v. Gressette, 432 U.S. 491 (1977), South Carolina's 1971 Senate redistricting plan was under review by the Attorney General for preclearance when several suits were filed in the federal district court in South Carolina to enjoin use of the plan. The Attorney General objected to the plan within 60 days of its submission. The district

will not have a discriminatory purpose or effect.[165] Once preclearance has been obtained, private parties that are dissatisfied with the Attorney General's action must resort to traditional lawsuits to attack the constitutionality of the new enactment; section 5 provides no further remedy.[166]

In the same vein, an objection by the Attorney General need not be based on his actually finding that the submitted changes will have a discriminatory purpose or discriminatory effect.[167] If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the sixty-day period, he will enter an objection.[168] The entity seeking preclearance has the burden of proving that the proposed change does not have either a discriminatory purpose or a discriminatory effect.[169] Moreover, an Attor-

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court found the plan violative of the fourteenth amendment and allowed the state 30 days to enact an acceptable plan. *Id.* at 495-96. The state enacted a new plan that was filed with the district court and submitted to the Attorney General for preclearance. Shortly thereafter, the district court found the plan constitutional, and a month later the Attorney General notified South Carolina that he would not interpose an objection because he felt "constrained to defer to the . . . determination of the three-judge District Court." *Id.* at 496-97.

The plaintiffs filed suit in the District of Columbia district court challenging the Attorney General's failure to object. The District of Columbia court ordered the Attorney General to make "a reasoned decision in accordance with his statutory responsibility." *Id.* at 497. The Attorney General contended that the plan violated the fifteenth amendment but again refused to object due to the South Carolina district court ruling. *Id.* at 491. After the District of Columbia district court ordered the Attorney General not to consider the South Carolina district court's ruling, the Attorney General objected to the plan. *Id.* at 498. The Supreme Court, however, found that the Attorney General's belated objection to the second plan was invalid. *Id.* at 507.

In dissent, Justice Marshall argued that preclusion of judicial review of an Attorney General's failure to object would allow a future Attorney General to trade § 5 preclearance for electoral votes. *Id.* at 508. The majority noted, however, that the Act's preclearance procedures were premised on the assumption that the Attorney General would faithfully uphold his duty. *Id.* at 506 n.23.

[165] Morris v. Gressette, 432 U.S. 491, 502 (1977). "[C]ompliance with § 5 is measured solely by the *absence*, for whatever reason, of a timely objection on the part of the Attorney General." *Id.*

[166] Allen v. State Bd. of Elections, 393 U.S. 544, 549-50 (1969); *see* United States v. East Baton Rouge School Bd., 594 F.2d 56, 59-60 (5th Cir. 1979) (preclearance by Attorney General does not preclude independent litigation challenging multi-member ward system).

[167] *See* Morris v. Gressette, 432 U.S. 491, 502 n.16 (1977); Georgia v. United States, 411 U.S. 526, 537-38 (1973).

[168] Georgia v. United States, 411 U.S. 526, 537 (1973); *see* 28 C.F.R. § 51.39(e) (1981).

[169] 28 C.F.R. § 51.39(e) (1981). The burden of proof on a submitting entity is the

ney General's decision to object may not be reviewed by any court,[170] but an aggrieved political subdivision may ask for a reconsideration or seek a judgment in the District of Columbia district court declaring that the proposed change will have neither the purpose nor effect of racial discrimination in voting.[171]

III. 1982 Amendments to the Act

The 1982 amendments[172] to the '65 Act represent the most extensive and substantive changes made in its seventeen-year history. Section 2, which is applicable to every section of the country,[173] as amended prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgment of the right . . . to vote" because of race, color, or membership in a minority language group.[174] A violation is established if the plaintiff shows, based on the totality of the circumstances, that the political processes leading to nomination or election in the political subdivision are not equally open to participation by members of a racial or language group minority.[175] A process is not equally open to participation if members of the protected class have less opportunity than other voters to participate in the political process and to elect representatives of their choice.[176] Although the extent to which members of a protected class have been elected to office is one "circumstance" that may be considered, the amendment specifically states that failure to provide proportional representation is not a violation of section 2.[177]

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same standard to be utilized in a declaratory judgment action in the District of Columbia district court. *Id.*

[170] *See* Morris v. Gressette, 432 U.S. 491, 501 (1977).

[171] *Id.* at 505 n.21; *see* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.43(b)-(c) (1981).

[172] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (amending at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976 & Supp. IV 1980)).

[173] Section 2, a permanent provision of the Act, applies to changes in voting laws and procedures, as well as to existing laws and procedures, in both covered and noncovered jurisdictions. 42 U.S.C. § 1973 (1976), *amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

[174] 42 U.S.C. § 1973 (1976), *amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3(a), 96 Stat. 131, 134.

[175] 42 U.S.C. § 1973 (1976), *amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3(b), 96 Stat. 131, 134.

[176] 42 U.S.C. § 1973 (1976), *amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3(b), 96 Stat. 131, 134.

[177] The 1982 amendment expressly provides that "nothing in . . . [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion

The significance of these changes is twofold. First, section 2 and the fifteenth amendment, as previously interpreted, proscribed only purposeful voting discrimination in covered as well as non-covered jurisdictions.[178] The 1982 amendment requires courts to interpret the fifteenth amendment as prohibiting voting procedures that have either a discriminatory purpose *or* a discriminatory effect.[179] Thus, while the original Act was clearly aimed at ensuring that minority groups would be able to register and cast their votes,[180] the amendment focuses on the effectiveness of the votes cast by minorities, and to an extent, their success in winning elections.

Second, only those voting practices enacted by covered jurisdictions after 1964 are subject to section 5's discriminatory purpose or effect test; discriminatory practices enacted prior to 1964 cannot be challenged under section 5.[181] The 1982 amendment to section 2, however, prohibits use of any voting practice that has a discriminatory effect regardless of when the practice was enacted or implemented.[182]

For those jurisdictions subject to federal scrutiny under section

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in the population." 42 U.S.C. § 1973 (1976), *amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3(b), 96 Stat. 131, 134.

In a 1976 case, the Supreme Court noted that it has "rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population." Beer v. United States, 425 U.S. 130, 136 n.8 (1976) (citing Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)); *see also* Lodge v. Buxton, 639 F.2d 1358, 1362 (5th Cir. 1981) (no right to representation proportionate to voting strength in the community), *aff'd sub nom.* Rogers v. Lodge, 102 S.Ct. 3272 (1982).

[178] Prior to the 1982 amendment, § 2 of the Voting Rights Act read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen to the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1976), *amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3(a), 96 Stat. 131, 134; *see also* United States v. County Bd. of Elections, 248 F. Supp. 316, 317 (W.D.N.Y. 1965) (§ 2 designed to remedy deprivations of franchise occurring anywhere in this country), *appeal dismissed*, 383 U.S. 575 (1966). For the Supreme Court's interpretation of the fifteenth amendment, see *supra* notes 54-57 and accompanying text.

[179] 127 CONG. REC. H6842 (daily ed. Oct. 2, 1981) (statement by Rep. Rodino). *See generally Report*, *supra* note 3, at 18 (H.R. 3112 replaces "intent" standard with "results" test for identifying discrimination).

[180] *See supra* notes 17-19, 63-65, and accompanying text.

[181] 42 U.S.C. § 1973c (1976); *see* Beer v. United States, 425 U.S. 130, 138 (1976).

[182] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (amending 42 U.S.C. § 1973c (1976)).

5,[183] the changes to the section 4(a) bailout procedure, though not as well publicized, are equally far-reaching and are possibly of more consequence than the changes to section 2. The amendments to section 4(a) take effect on August 5, 1984.[184] Currently, a jurisdiction subject to section 5 preclearance can bail out upon a showing that it has not used any racially discriminatory "test or device" in the electoral process for the past seventeen years.[185] Because the proscribed tests or devices were outlawed in August 1965,[186] it is fairly certain that all subject jurisdictions ceased using these tests long ago and could bail out in 1982, or shortly thereafter, without an extension of section 4(a). Under the amendment, this provision would be extended for two years.[187] At that time (August 1984), in order to bail out, the covered jurisdiction will have to show that during the ten years prior to the action seeking bailout that:

(1) no proscribed tests or devices have been used;
(2) no final judgment of any United States court has determined that the right to vote has been denied or abridged because of race or color anywhere in the state or political subdivision;
(3) no consent decree, settlement, or agreement has been entered that resulted in the abandonment of a voting practice challenged as discriminatory;
(4) no federal examiners have been assigned to the state or political subdivision;
(5) the state or political subdivision and all governmental units within it have complied with section 5, no covered change has been enforced without preclearance, and all changes that have been objected to have been repealed;
(6) no submission to the Attorney General has been objected to nor declaratory judgment denied under the section 5 preclearance requirements;
(7) the political entity seeking to bail out and all governmental units within its territory:

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[183] *See* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51 app., at 464-65 (1981).

[184] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131, 131 (amending 42 U.S.C. § 1973b (1976)).

[185] *See supra* notes 31-34 and accompanying text.

[186] *See* 42 U.S.C. § 1973a (1976).

[187] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131, 131 (amending 42 U.S.C. § 1973b (1976)).

(a) has eliminated voting and election methods that had inhibited or diluted equal access to the electoral process;
(b) has made constructive efforts to eliminate intimidation and harrassment of persons exercising rights guaranteed by the Act; and
(c) has endeavored to expand the opportunity for convenient registration and voting for all eligible persons and to appoint minority persons as election officials;

(8) the political entity has not violated any provision of the Constitution or law of the United States or any state or political subdivision with respect to voting discrimination, unless the violations were trivial, promptly corrected, and not repeated.[188]

Thus, instead of merely showing that it has not used any proscribed test or device, the evil for which the stringent remedies of the Act were designed,[189] a covered jurisdiction and every governmental unit within it, in order to bail out under the amendments, must show additionally that is has complied meticulously with section 5; that nothing submitted for preclearance has been objected to; that it has not violated any constitutional provision or federal or state statute dealing with voting discrimination; and furthermore, that it has acted affirmatively to eliminate any voting method or procedure that dilutes equal access to the electoral process, to expand the ease by which all eligible persons vote or register, and to appoint minority persons as election officials.[190]

Under the amendments the remedies of the Act are far more stringent because the prospect of a jurisdiction ever being able to bail out are substantially lessened. Because the criteria for bailout were emphasized by the Supreme Court in upholding the constitutionality of the original Act,[191] the new procedure will undoubtedly be subjected to

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[188] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4)(A)-(F), 96 Stat. 131, 131-32 (amending 42 U.S.C. § 1973b (1976)). The provisions of § 4 will be reviewed by Congress 15 years from the effective date of the 1982 amendments and will expire altogether 25 years from that date. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(7)-(8), 96 Stat. 131, 133 (amending 42 U.S.C. § 1973c (1976)).

[189] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969); South Carolina v. Katzenbach, 383 U.S. 301, 331 (1967).

[190] *See supra* text accompanying note 188.

[191] *See* South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966); *see also Report,*

constitutional challenge.[192]

Another change effected by the 1982 amendments will allow individual political subdivisions in a state covered by the Act to bail out separately.[193] Current law prohibits any political entity from breaking free of the preclearance requirements until every entity within the state, and thus the state itself, can bail out.[194] Under the amendments, however, any city or county that can meet the new bailout criteria will be allowed to seek a declaratory judgment to that effect and will, if successful, no longer be required to preclear voting changes.

In theory, these changes would appear not only proper but mandatory in enforcing the fifteenth amendment. It is in practice, however, that the changes may be faulted. One alleged target of the change to section 2 is the commission form of government,[195] which, by 1980, was utilized in 198 cities throughout the country.[196] Because the commission membership, usually two commissioners and a mayor, is elected at large, opponents of this form of government have contended that a member of a minority community can never be elected to the commission, and thus the minority population can never elect a representative of its choice.[197] Extended to its logical conclusion, this argument indicates that members of one race can be fairly represented only

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supra note 3, at 60 (statement of Attorney General Smith) (in sustaining the Act Supreme Court gave special consideration to temporary nature of preclearance provisions); *cf.* City of Rome v. United States, 446 U.S. 156, 204 (1980) (Powell, J., dissenting) (by prohibiting bailout for city in a covered state, Court has sealed off the Act's constitutionally necessary safety valve).

[192] *See Report, supra* note 3, at 62 (statement of Attorney E. Freeman Leverett) ('65 Act was justified because an emergency existed and so few minorities were registered; making the preclearance requirements permanent raises serious questions).

[193] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131, 131 (amending 42 U.S.C. § 1973b (1976)). This provision becomes effective on August 5, 1984. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131, 131 (amending 42 U.S.C. § 1973b (1976)).

[194] *See* City of Rome v. United States, 446 U.S. 156, 169 (1980).

[195] The commission form of government originated in response to the corruption and abuse associated with the "boss control" of ward politics. The commission form of government first appeared in Galveston, Texas, around 1900, and soon spread to other cities that sought business-like efficiency in government. *See* Jordan v. City of Greenwood, 534 F. Supp. 1351, 1352 (N.D. Miss. 1982).

[196] *See id.* In City of Mobile v. Bolden, 446 U.S. 55, 58 (1980), black plaintiffs challenged the consitutionality of Mobile's commission form of government, basing their claim on deprivations of fourteenth and fifteenth amendment rights.

[197] *See* City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) (objections to at-large elections focus on lack of representation afforded minorities); Kirksey v. City of Jackson, 506 F. Supp. 491, 506 (S.D. Miss. 1981) (alleged that blacks cannot be elected to city commission under at-large voting scheme).

by a member of the same race. And in turn, despite the disclaimer in the section 2 amendment, proportional representation will become a major focus of section 2 litigation,[198] further polarizing racial and ethnic groups by emphasizing differences rather than focusing on the concept of equality.

IV. The Mississippi Experience

A. *United States v. Mississippi*

Mississippi became subject to section 5's preclearance requirements on August 6, 1965.[199] Only seven months prior to that date the state had been before the United States Supreme Court, in *United States v. Mississippi*,[200] defending allegations that the state had spent the previous seventy-five years adopting "whatever expedient seemed necessary to establish white political supremacy."[201]

The United States Attorney General sued the State of Mississippi and certain state and county officials for engaging in practices that hampered the right of black Mississippians to vote.[202] The United States alleged that prior to the adoption in 1890 of Mississippi's present constitution a majority of the state's qualified voters were black. After adoption of the constitution, all voters were required to be able to read, understand, or interpret any section of the state constitution before being allowed to vote.[203] According to the complaint, a major purpose of the 1890 constitution was to "restrict the Negro franchise and to establish and perpetuate white political supremacy and racial segregation."[204] Furthermore, until 1952 blacks were not eligible to

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[198] *See Report, supra* note 3, at 34 (statement of Attorney General Smith); *id.* at 34-35 (statement of Professor Donald Horowitz).

[199] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51 (1965).

Other states and political subdivisions that became subject to the preclearance requirements on August 6, 1965, include Alabama, Georgia, Louisiana, South Carolina, Virginia, and selected parts of Alaska, Arizona, Idaho, North Carolina, and Hawaii. *Id.* Since that time, the entire states of Alaska, Arizona, and Texas, as well as parts of California, Colorado, Connecticutt, Florida, Idaho, Massachusetts, Michigan, New Hampshire, New York, South Dakota, and Wyoming have come under the Act's coverage. *See id.* app., at 464-65 (1981).

[200] 380 U.S. 128 (1965).

[201] *Id.* at 143-44.

[202] *Id.* at 130.

[203] *Id.* at 131-32.

[204] *Id.*

vote in the state's Democratic party primary.[205] Thus, between 1899 and 1954 the percentage of blacks eligible to vote decreased from over fifty percent to only five percent.[206]

The state constitution was amended in 1954 to require voters to read, copy in writing, and interpret any section of the state constitution, as well as demonstrate to the county registrar "a reasonable understanding of the duties and obligations of citzenship under a constitutional form of government."[207] In 1960, another amendment to the state's constitution required voters to prove that they were of good moral character.[208] Moreover, the legislature in 1960 repealed a state law that had required all voter application forms to be retained as permanent public records.[209]

The complaint further alleged that statutes enacted in 1962 hindered the efforts of blacks to register and to vote. One statute required voter applicants to fill in all blanks of the application form properly and without any assistance.[210] Additionally, registrars were prohibited from telling an applicant why he was rejected, because this information might have constituted "assistance" regarding any subsequent application.[211]

The effect of these changes in state voting laws was substantial. For example, the complaint alleged that in Amite County 3,295 of the 4,449 white voting age residents were registered, but only 1 of the 2,560 eligible black voters was registered.[212]

In holding for the United States, the Supreme Court noted that the allegations in the complaint were too serious, the right to vote too precious, and the need to settle grievances peacefully in the courts too important for the complaint to have been dismissed. The Supreme

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[205] *Id.* at 132.

[206] *Id.*

[207] MISS. CONST. art. 12, § 244 (1890), *repealed by* Act of Mar. 6, 1975, ch. 523, 1975 Miss. Laws 844.

[208] MISS. CONST. art. 12, § 241-A (1890), *repealed by* Act of July 1, 1965, ch. 40, 1965 Miss. Laws 76 (extraordinary session).

[209] Act of Apr. 15, 1960, ch. 449, 1960 Miss. Laws 737 (amending MISS. CODE § 3209.6 (1942)), *repealed by* Act of May 15, 1972, ch. 490, § 604, 1972 Miss. Laws 674, 696.

[210] Act of May 23, 1962, ch. 570, § 1, 1962 Miss. Laws 1011 (amending MISS. CODE § 3213 (1942)), *repealed by* Act of June 30, 1965, ch. 16, § 1, 1965 Miss. Laws 38 (extraordinary session).

[211] Act of May 23, 1962, ch. 571, § 2, 1962 Miss. Laws 1012 (codified at MISS. CODE § 3213.5 (Supp. 1972), *amended by* Act of June 30, 1965, ch. 14, § 1, 1965 Miss. Laws 37 (extraordinary session).

[212] 380 U.S. at 134.

Court reversed the three-judge court's dismissal of the case and remanded it for trial.[213]

The following year, in 1966, Mississippi joined Alabama, Georgia, Louisiana, and Virginia in supporting South Carolina's challenge to the constitutionality of the Act.[214] Mississippi, along with Alabama and Louisiana, was specifically cited for discriminatory voting practices[215] that legitimized the need for the stringent remedies imposed by the Act.[216] Moreover, the Supreme Court's first and most comprehensive interpretation of section 5, *Allen v. State Board of Elections*,[217] involved three Mississippi cases in which the Court found each of the challenged practices to be subject to the preclearance requirements.[218] During the debate over extending the Voting Rights Act in 1982, Mississippi was again named as a major reason for extending the Act.[219]

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[213] *Id.* at 144.

[214] South Carolina v. Katzenbach, 383 U.S. 301, 307 n.2 (1966). Twenty-one states supported the United States Attorney General. *Id.* Of these 21, only Hawaii's one county was subject to § 5 at the time of the suit. Since that time, portions of the five states that supported the Attorney General, California, Massachusetts, Michigan, New Hampshire, and New York, have become subject to the preclearance requirements. 28 C.F.R. § 51 app., at 464-65 (1981).

While Mississippi, Alabama, and Louisiana were highlighted by the *Katzenbach* Court in discussions of the most recent voting suits at that time, 383 U.S. at 312, Georgia, North Carolina, South Carolina, and Virginia were also cited for enacting tests still used in 1966 to prevent blacks from voting. *Id.* at 310.

[215] South Carolina v. Katzenbach, 383 U.S. 301, 312 (1966). Widespread discriminatory voting practices had been found in eight Alabama cases, nine Louisiana cases, and nine Mississippi cases. The discrimination arose from the unequal application of voting tests. Prospective white voters were registered despite serious errors in their answers but blacks were given difficult versions of the tests, were not allowed any assistance, and were required to answer correctly. *Id.*

For example, in Forrest County, Mississippi, the county registrar rejected six black voter applicants with college degrees, including three with masters degrees. The Panola County registrar required black voter applicants to interpret a complicated section of the state constitution dealing with the interest rate on the Chickasaw School Fund. *Id.* at 312 n.13.

[216] "[T]he new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination." *Id.* at 329. Congress concluded that substantial voting discrimination had occurred in certain sections of the country and chose to limit its attention to the geographic areas where immediate action seemed necessary. *Id.* at 328.

For a more complete discussion of the Court's reasoning in *South Carolina v. Katzenbach*, see *supra* notes 58-62, 70-74, and accompanying text.

[217] 393 U.S. 544 (1969).

[218] *See supra* notes 81-90 and accompanying text.

[219] *See, e.g.*, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, VOTING IN MISSISSIPPI: A RIGHT STILL DENIED (1981); *Hearings*, *supra* note 63, at 17 (statement of Vernon

The two major contentions concerning Mississippi were that (1) without the Act, Mississippi would enact discriminatory voting practices, and (2) the state had failed to comply with the preclearance requirements and thus should be subject to the Act until it began doing so with regularity.[220]

The first contention was based on Justice Department objections to voting changes under section 5. Although Mississippi has submitted over 1300 changes to the Justice Department without objection, eighty-three objections have been interposed to voting changes submitted by the state over the past eighteen years.[221] Two of the eighty-three objections were withdrawn without further action by the political subdivisions, and a third was overturned by the District of Columbia district court. Only thirteen of the "surviving" objections, or 15% of the total, have been interposed since 1977. Thus, in the last four and one-half years (1978 through June 30, 1982) less than 2% of the submitted changes have generated objections.[222]

B. The Fourteen-Year Reapportionment Litigation

The most frequently cited of Mississippi's section 5 objections is

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E. Jordan, Jr., President, National Urban League); *id.* at 21 (statement of Lane Kirkland, President, AFL-CIO); *id.* at 1769 (statement of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights); UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 28, 37, 58-59 (1981).

[220] LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *supra* note 219, at front cover. "Since 1975 there have been as many Voting Rights Act objections to discriminatory election law changes in Mississippi as there were before 1975. Continuing efforts to impede and dilute black voting strength include . . . implementing voting changes without Voting Rights Act preclearance." *Id.*; *see also infra* notes 504-24 and accompanying text (discussion of unprecleared election practices).

[221] The following chart reflects the number of submissions to and objections by the Attorney General since the enactment of the Act. The submissions include those made by the State of Mississippi as well as political subdivisions within the state.

	1965	1966	1967	1968	1969	1970	
Submissions	0	0	0	0	4	28	
Objections	0	0	0	0	4	1	
	1971	1972	1973	1974	1975	1976	
Submissions	221	68	66	41	107	152	
Objections	19	4	7	2	17	7	
	1977	1978	1979	1980	1981	1982	Total
Submissions	114	123	112	153	132	86	1,407
Objections	8	2	3	3	5	1	83

Department of Justice, July, 1982. Figures are current through June 39, 1982.

[222] A complete list of the objections from 1965 through June 30, 1982, follows:

the fourteen-year legislative reapportionment litigation. Initiated in 1965, the case was litigated before two three-judge courts and reached the United States Supreme Court nine times.

The litigation originated when private plaintiffs challenged the constitutionality of Mississippi's 1962 reapportionment plan for the

SUBDIVISION	OBJECTION	DATE OF OBJECTION
State	Appointment of county superintendents of education; optional at-large election of county boards of supervisors; two qualification requirements for independent candidates in general elections	5-21-69
State	Repeal of assistance to illiterates	5-26-69
Copiah County	Redistricting	3-5-70
Leake County	Redistricting	1-8-71
Warren County	Redistricting	4-4-71
Marion County	Redistricting	5-25-71
Jasper County	Re-registration	6-8-71
Grenada County	At-large elections; multi-member plan; numbered posts	6-30-71
Attala County	Numbered posts; at-large elections	6-30-71
Hinds County	Redistricting	7-14-71
Lafayette County	Polling place	7-16-71
Yazoo County	Redistricting	7-19-71
State	At-large elections; numbered posts (county supervisors)	9-10-71
Tate County	Redistricting; precinct lines; polling places	12-3-71
Marshall County	Precinct lines; polling places	12-3-71
Grenada (Grenada Cty.)	At-large elections; numbered posts; majority vote requirement	3-20-72
Tate County	Redistricting	11-28-72
Indianola (Sunflower Cty.)	Numbered posts	4-20-73
McComb (Pike Cty.)	Annexation	5-30-73*
Hollandale (Washington Cty.)	Appointment of city clerk	7-9-73
Grenada County	Redistricting	8-9-73
Pearl (Rankin Cty.)	Incorporation	11-21-73#
Shaw (Bolivar Cty.)	Appointment of city clerk	11-21-73
State	H.B. Nos. 362 and 363 (1970)—open primary	4-26-74
Attala County	Redistricting	9-3-74
Grenada (Grenada Cty.)	Annexation	2-5-75%$

*Withdrawn 9-12-73
#Withdrawn 1-3-74 upon modification of annexation policies
$Withdrawn 6-25-76 upon annexation of minority area

SUBDIVISION	OBJECTION	DATE OF OBJECTION
Bolivar Cty. Board of Eucation	District to at-large elections	4-8-75
Grenada (Grenada Cty.)	Six annexations	5-2-75
State	S.B. No. 2218 (1975)—qualifying date for independent candidates	6-4-75
State	S.B. No. 2976 and H.B. 1290—State Senate and house redistricting	6-10-75
Warren County	Polling place	6-16-75
Lowndes Cty. Board of Education	Districts to at-large elections	6-23-75
Clay County	Two polling places	7-25-75
State (Kemper, Warren, Marshall, Benton and Leake Ctys.)	Section 37-5-13 (1972 Code)—districts to at-large elections (board of education)	12-1-75
Grenada County	Redistricting	3-30-76
State	H.B. Nos. 197 and 114—open primary	8-23-76
Kosciusko (Attala Cty.)	At-large elections; numbered posts; majority vote requirement	9-20-76
Vicksburg (Warren Cty.)	Annexation	10-1-76&
Jackson (Hinds Cty.)	Annexation	12-3-76@

%Withdrawn 6-25-76 upon annexation of minority area
&Withdrawn 4-28-77 upon submission of single-member-district plan
@Withdrawn 7-23-81

SUBDIVISION	OBJECTION	DATE OF OBJECTION
Tunica County	Elective to appointive (superintendent of education)	1-24-77
Lexington (Holmes Cty.)	At-large elections	2-25-77
Lee County	Re-registration	4-4-77+
Canton (Madison Cty.)	Redistricting	4-13-77
State (Coahoma, DeSoto, Holmes, Humphreys, Leflore, Quitman, Sunflower, Tallahatchie, Tunica and Yazoo Ctys.)	Section 37-5-15 (1972 Code)—board of education in ten countries elected at-large with residency districts	7-8-77
Sidon (Leflore Cty.)	Annexation	10-28-77
State	S.B. 3098 and H.B. 1491—redistricting of State House and Senate	7-31-78•
Walthall County	Redistricting (supervisors' districts)	11-27-78
State	Chapter 452 (S.B. No. 2802) (1979)—"open primary" law; majority vote	6-11-79
State	Chapter 433 (H.B. No. 854) (1979)—assistance to illiterates, blind and physically disabled voters	7-6-79
Tunica County	Use of electronic punch card system	10-16-79
Louisville Municipal Separate School District (Winston Cty.)	Majority vote requirement	3-28-80

+Withdrawn 8-19-77 upon submission of modifications to procedures
•Declaratory judgment received 6-1-79

state legislature.[223] The Supreme Court held that the 1962 plan violated the one-man, one-vote principle enunciated in *Reynolds v. Sims*[224] two years earlier.[225] The legislature formulated another plan for the 1967 elections that also violated the one-man, one-vote standard,[226] and the three-judge court[227] formulated its own temporary court-ordered plan for the 1967 elections.[228]

In 1971, the three-judge court again found that a third reapportionment plan designed by the legislature violated the one-man, one-vote criteria and again formulated its own court plan for the 1971 elections.[229] This plan was appealed to the United States Supreme Court, which stated its preference for single-member districts in court-ordered plans and instructed the district court to devise a single-member district for Hinds County absent any insurmountable difficulties.[230] The three-judge court found it impossible to devise the mandated sin-

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SUBDIVISION	OBJECTION	DATE OF OBJECTION
Orange Grove (Harrison Cty.)	Incorporation	6-2-80
Batesville (Panola Cty.)	Redistricting	9-29-80
Mendenhall (Simpson Cty.)	Annexation	1-12-81
State	H.B. 674, Chapter 487 (1979)—Sections 1, 2, 5 (established a new system of maintaining registration books and poll books); Section 4 (prohibits campaigning within 500 feet of a polling place)	4-6-81
Indianola (Sunflower Cty.)	1965 annexation	6-1-81
Holly Springs (Marshall Cty.)	Redistricting	6-9-81
State	S.B. No. 2001 (1981)—reapportionment of congressional districts	3-30-82

Department of Justice

[223] Connor v. Johnson, 256 F. Supp. 962, 965 (S.D. Miss. 1966).

[224] 374 U.S. 533, 555 (1964).

[225] Connor v. Johnson, 256 F. Supp. 962, 967 (S.D. Miss. 1966).

[226] Connor v. Johnson, 265 F. Supp. 492, 493-94 (S.D. Miss.), *aff'd*, 386 U.S. 483 (1967).

[227] Circuit Judge Coleman and district judges Cox and Russell comprised the three-judge court. 265 F. Supp. at 493.

[228] *Id.* at 494.

[229] Connor v. Johnson, 330 F. Supp. 506, 508 (S.D. Miss. 1971), *vacated sub nom. per curiam*, Connor v. Williams, 404 U.S. 549 (1972).

[230] Connor v. Johnson, 402 U.S. 690, 692 (1971).

gle-member district in time for the 1971 elections,[231] and the Supreme Court denied further interlocutory relief.[232]

After the 1971 elections, the 1971 court-ordered plan was again appealed to the Supreme Court, which found the 18.9% and 19.7% variances in the state Senate and House plans respectively too great, but declined to invalidate the 1971 elections.[233] The Court remanded the case after noting that a special master was to be appointed to determine whether the state's three largest counties could be divided into single-member districts for the 1975 elections.[234]

A special master was not appointed, and in April 1973 the legislature devised yet another reapportionment plan. Objections were filed against the plan, but the three-judge court delayed hearings until February 1975.[235] Upon learning that the legislature was considering revisions to the 1973 plan, the three-judge court delayed its decision pending legislative action.[236] The three-judge court subsequently approved the April 1975 legislative plan;[237] however, the plan was rendered ineffective by the Supreme Court in June 1975 because it had not been precleared as required by section 5 of the Act.[238]

On June 9, 1975, the plan was submitted to the United States Attorney General who interposed an objection one day later because the state had failed to show an absence of discriminatory purpose or discriminatory effect.[239] The three-judge court then determined that there was not enough time to devise a final reapportionment plan prior to the August 1975 primary elections and thus adopted a temporary court plan utilizing multi-member districts for the 1975 elections.[240]

On May 19, 1976, the Supreme Court ordered the three-judge court to set a hearing within thirty days on all proposed permanent reapportionment plans to be used for the 1979 legislative elections.[241] The three-judge court held the required hearing and adopted a final

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[231] Connor v. Johnson, 330 F. Supp. 521, 523 (S.D. Miss. 1971), *vacated sub nom. per curiam,* Connor v. Williams, 404 U.S. 549 (1972).

[232] Connor v. Johnson, 403 U.S. 928 (1971).

[233] Connor v. Williams, 404 U.S. 549, 550-51 (1972).

[234] *Id.* at 551.

[235] Connor v. Coleman, 440 U.S. 612, 616 (1979) (Marshall, J., dissenting).

[236] Connor v. Waller, 396 F. Supp. 1308, 1311 (S.D. Miss.), *rev'd,* 421 U.S. 656 (1975).

[237] Connor v. Waller, 396 F. Supp. 1308, 1332 (S.D. Miss.), *rev'd,* 421 U.S. 656 (1975).

[238] Connor v. Waller, 421 U.S. 656 (1975).

[239] Connor v. Coleman, 440 U.S. 612, 617 (1979) (Marshall, J., dissenting).

[240] Connor v. Waller, No. 3830 (S.D. Miss. June 25, 1975).

[241] Connor v. Coleman, 425 U.S. 675, 679 (1976).

plan to take effect in 1979.[242] On May 31, 1977, the Supreme Court found that this plan violated the one-man, one-vote standard.[243] Because court-ordered plans were to be held to de minimus variations, the 16.5% and 19.3% deviations in the plans for the state Senate and House were unacceptable.[244] The three-judge court was directed to draw districts that were "reasonably contiguous and compact . . . or explain precisely why in a particular instance that goal [could] not be accomplished."[245]

In a special session held in August 1977 the legislature created a Special Joint Committee on Reapportionment to formulate legislative reapportionment plans for submission to the three-judge court.[246] The Joint Committee, and subsequently the legislature, adopted four sets of legislative plans: a court plan and a statutory plan based on Census Enumeration Districts, which were then converted into a precinct-based plan because of both the three-judge court's and the legislature's preferences for a plan using precinct lines.[247]

The court plan was submitted to the three-judge court during a trial that began November 21, 1977, and concluded February 14, 1978.[248] The statutory plan was submitted to the United States Attorney General, who interposed an objection on July 31, 1978.[249] The next day, the state sought a declaratory judgment in the District of Columbia district court that the statutory reapportionment plan had neither a discriminatory purpose nor a discriminatory effect.[250]

In June 1978, the local three-judge court directed the parties to confer for the purpose of arriving at a settlement plan. The Joint Reapportionment Committee recommended acceptance of the settlement plan, but the state sought to stay proceedings before the three-judge court until the conclusion of the section 5 litigation in Washington.[251] At a November 29, 1978, hearing the local three-judge court stated its intention to await conclusion of the litigation concerning the legislative

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[242] Connor v. Finch, 419 F. Supp. 1072, 1089, *supplemented* 422 F. Supp. 1014 (S.D. Miss. 1976).

[243] Connor v. Finch, 431 U.S. 407, 416-17, 420 (1977).

[244] *Id.* at 425.

[245] *Id.* at 425-26.

[246] Mississippi v. United States, 490 F. Supp. 569, 572 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[247] 490 F. Supp. at 573.

[248] Connor v. Coleman, 440 U.S. 612, 620 (1979) (Marshall, J., dissenting).

[249] *Id.*

[250] *Id.*

[251] *Id.* at 620-21.

plan before "rushing in" with a court-ordered plan.[252] But on March 26, 1979, the Supreme Court ordered the three-judge court to adopt a reapportionment plan,[253] and on April 13, 1979, the three-judge court adopted a modified version of the settlement plan.[254]

Thereafter, on June 1, 1979, the District of Columbia district court found that the statutory reapportionment plan previously objected to by the Attorney General had neither the purpose nor the effect of denying or abridging blacks' right to vote. Accordingly, the District of Columbia court held that the statutory plan would supercede the Mississippi three-judge court plan.[255]

In August 1981, the local three-judge court awarded a total of $127,687 in attorney's fees to the Lawyers Committee for Civil Rights Under Law.[256] Although the reapportionment plan ultimately utilized for the 1979 elections was formulated by the Mississippi Legislature, the court found that the plaintiffs' efforts provided the impetus that, after fourteen years, culminated in the successful statutory plan.[257]

At least eight attorneys in the Mississippi Attorney General's office were involved in the litigation[258] along with a Washington, D.C. attorney who was hired to guide the litigation from 1977 until its completion.[259] Development of the accepted plan in 1977-78 cost the state $1,204,229,[260] including the expense of two special legislative ses-

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[252] *Id.* at 621.

[253] *Id.* at 614.

[254] Connor v. Finch, 469 F. Supp. 693, 694 (S.D. Miss. 1979).

[255] Mississippi v. United States, 490 F. Supp. 569, 583 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[256] Connor v. Winter, 519 F. Supp. 1337, 1352 (S.D. Miss. 1981).

[257] *Id.* at 1342. For a thorough history of the reapportionment case, see generally Conner v. Coleman, 440 U.S. 612, 614-24 (1969) (Marshall, J., dissenting); Connor v. Winter, 519 F. Supp. 1337, 1340-42 (S.D. Miss. 1981); Mississippi v. United States, 490 F. Supp. 569, 571-74 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[258] Attorneys from the Mississippi Attorney General's Office who participated in the litigation included Martin McClendon, Will Wells, William Allain, Heber Ladner, Jr., Attorney General A.F. Summer, Peter Stockett, Giles Bryant, and William Boyd. Conversation with William Boyd (Apr. 1982).

[259] In August, 1977, the Special Joint Committee on Reapportionment hired as special counsel Jerris Leonard, a former United States Assistant Attorney General for Civil Rights. Mississippi v. United States, 490 F. Supp. 569, 572 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[260] The cost breakdown is as follows:

Leonard and Associates	$240,828
Census Bureau	237,657
Reapportionment specialists	114,250
Bill Allain	65,578

sions.[261] To devise the plan, the Joint Reapportionment Committee utilized four out-of-state reapportionment experts plus a six-member staff.[262] That staff was supplemented by a ten-member part-time mapping staff that drew precinct maps for every county as well as the visual results of each of the four plans in each county.

Of the state's $1,204,229 expense, $237,657 was paid to the Census Bureau[263] to perform "splits" of census enumeration districts (EDs).[264] Precinct lines in Mississippi do not coincide with the boundary lines used by the Census Bureau to enumerate smaller population areas. Thus, when a precinct line splits an ED, the Census Bureau provided the population figures for both sides of the line splitting the ED in order to obtain accurate population figures for the precinct plans.[265] In addition to the expense of $1,204,229, the state paid $127,687 in attorney's fees for the plaintiffs.[266]

The final approved plan resulted in the election of fifteen blacks to the Mississippi House of Representatives and two blacks to the state Senate.[267] Prior to the 1979 elections only four blacks served in the House and no blacks served in the Senate.[268]

C. Objections to At-Large Voting Districts

1. At-Large Supervisor Elections

The first objection to voting changes in Mississippi concerned a 1966 enactment by the state legislature that gave counties the option of electing county boards of supervisors at-large rather than from dis-

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Other professional fees	58,795
Staff salaries	52,765
All other staff expenses	114,654
2 special legislative sessions	319,702
State Auditor, April, 1982.	$1,204,229

[261] The first extraordinary session lasted two days, August 12-13, 1977. The second extraordinary session began on October 19, 1977, and ended December 9, 1977, with an interim adjournment from October 19 to December 1.

[262] Mississippi v. United States, 490 F. Supp. 569, 572 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[263] *See supra* note 260.

[264] *See* Mississippi v. United States, 490 F. Supp. 569, 573 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[265] *See id.*

[266] Connor v. Winter, 519 F. Supp. 1337, 1339 (S.D. Miss. 1981); *see supra* text accompanying notes 256-57.

[267] *See* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *supra* note 219 at 28.

[268] *Id.* at 27.

tricts as previously required by law.[269] The Supreme Court declared the enactment subject to section 5 and thus ineffective until precleared.[270] When the statute was submitted for preclearance, an objection was interposed by the United States Attorney General, who found that the change denied and abridged the voting rights of blacks on the basis of race or color.[271]

Two subsequent legislative attempts to provide for at-large supervisor elections also failed. One, a 1968 amendment,[272] was never precleared; the other, a 1971 amendment,[273] was objected to by the Attorney General, and the state did not seek to overturn that ruling in the District of Columbia district court.[274]

Despite the lack of preclearance, thirteen Mississippi counties with black populations of between 4.4% and 64.3% switched from district to at-large elections.[275] Four counties, Adams,[276] Coahoma,[277] Forrest,[278] and Washington,[279] were enjoined from using the new election procedure by private litigation. Five counties, Attala,[280] Carroll,[281] Gre-

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[269] Act of May 27, 1966, ch. 290, § 1, 1966 Miss. Laws 374 (amending MISS CODE § 2870 (1942)), *repealed in part by* Act of Apr. 29, 1980, ch. 425, § 5, 1980 Miss. Laws 798 (current version at MISS. CODE ANN. § 19-3-1 (Supp. 1982).

[270] Allen v. State Bd. of Elections, 393 U.S. 544, 550, 572 (1969); *see supra* notes 83-85 and accompanying text.

[271] Letter from Jerris Leonard, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (May 21, 1969).

[272] Act of May 27, 1968, ch. 564, 1968 Miss. Laws 946 (amending MISS. CODE § 2870 (1942)), *repealed in part by* Act of Apr. 29, 1980, ch. 425, § 5, 1980 Miss. Laws 798 (current version at MISS. CODE ANN. § 19-3-1 (Supp. 1982)).

[273] Act of Apr. 5, 1971, ch. 493, 1971 Miss. Laws 615 (amending MISS. CODE § 2870 (1942)), *repealed in part by* Act of Apr. 29, 1980, ch. 425, § 5, 1980 Miss. Laws 798 (current version at MISS. CODE ANN. § 19-3-1 (Supp. 1982)).

[274] Letter from David L. Norman, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (Sept. 10, 1971).

[275] The 13 counties attempting to change to at-large supervisor elections and the 1970 black population percentage of each county are as follows: Adams (47.9%), Attala (40.4%), Carroll (50.9%), Coahoma (64.3%), Forrest (24.5%), Grenada (43.8%), Hancock (14.2%), Issaquena (62.1%), Itawamba (5.6%), Leflore (57.9%), Lowndes (32.7%), Tishomingo (4.4%), and Washington (54.5%). U.S. Bureau of the Census 1970.

[276] Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969) (enjoined Apr. 23, 1969).

[277] Henry v. Coahoma County Bd. of Supervisors, No. DC 71-505 (N.D. Miss. July 7, 1971).

[278] Allen v. State Bd. of Elections, 393 U.S. at 572. For a history of Forrest County redistricting, see Fairley v. Patterson, 493 F.2d 598, 601 (5th Cir. 1974).

[279] Dyer v. Love, 307 F. Supp. 974, 981 (N.D. Miss. 1969).

[280] *See supra* note 222 (objection letter June 30, 1971).

[281] *See supra* note 222 (objection letter May 10, 1971).

nada,[282] Itawamba,[283] and Tishomingo,[284] submitted the changes to the Attorney General; objections were interprosed however, because the enabling legislation had never been precleared, and thus, there was no authorization for the counties to enact such changes. Four other counties, Hancock,[285] Issaquena,[286] Leflore,[287] and Lowndes,[288] were allowed to utilize at-large plans for the 1971 elections only.

In 1967, residents and voters of Itawamba County sought a court order requiring the board of supervisors to redistrict itself to provide districts of equal population.[289] On November 6, 1968, the court, relying on the Supreme Court's decision in *Avery v. Midland County*,[290] which extended the one-man, one-vote principle to county boards, ordered the Itawamba County Board of Supervisors to adopt either the at-large election system or to devise districts of equal population.[291] The Board selected the at-large system. After the Supreme Court's decision in *Allen v. State Board of Elections*,[292] which held that this type of change was subject to section 5 preclearance,[293] the change was submitted to the Attorney General.[294]

After the Attorney General's objection to the change, the plaintiffs requested permission to adopt the at-large election system.[295] The court denied this request and ordered the Board to redistrict; consequently, the plaintiffs sought to dismiss the case.[296] After the district court refused to dismiss the case, the plaintiffs appealed to the Court of Appeals for the Fifth Circuit. The court of appeals ruled that, having initiated a lawsuit to rectify constitutional wrongs, the plaintiffs

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[282] *See supra* note 222 (objection letter June 30, 1971).

[283] *See supra* note 222 (objection letter Apr. 16, 1970).

[284] *See supra* note 222 (objection letter May 12, 1970).

[285] Court ordered plan for 1971 not objected to, letter (Sept. 10, 1971).

[286] Hall v. Issaquena County Bd. of Supervisors, 453 F.2d 404, 404 (5th Cir. 1971) (new plan and election to be ordered no later than May 16, 1972).

[287] Moore v. Leflore County Bd. of Election Comm'rs, 351 F. Supp. 848, 852 (N.D. Miss. 1971) (allowing general election to proceed as scheduled for at-large election of county supervisors due to equitable considerations).

[288] Keller v. Gilliam, Nos. EC 7185-S,7195-S (N.D. Miss. Apr. 7, 1971), *modified*, 454 F.2d 55, 57-58 (5th Cir. 1972).

[289] Sheffield v. Itawamba County Bd. of Supervisors, 439 F.2d 35, 37 (5th Cir. 1971).

[290] 390 U.S. 474 (1968).

[291] Sheffield v. Itawamba County Bd. of Supervisors, 439 F.2d 35, 37 (5th Cir. 1971).

[292] 393 U.S. 544 (1969).

[293] *Id.* at 569-70.

[294] Sheffield v. Itawamba County Bd. of Supervisors, 439 F.2d 35, 37-38 (5th Cir. 1971).

[295] *Id.* at 39.

[296] *Id.* at 39-40.

could not privately determine its destiny.[297] In addition, the court reiterated that because the at-large election system had never received section 5 approval it could not be utilized.[298]

2. At-Large City Council Elections

Attempts to switch from district to at-large voting for elected officials other than county supervisors have met with a similar fate. Section 5's requirements stymied the efforts of four Mississippi cities to change to at-large city council elections. When the city of Canton switched from district to at-large elections for members of its board of aldermen, the Supreme Court held that the change could not go into effect without preclearance.[299] Subsequently, three other cities, Grenada,[300] Kosciusko,[301] and Lexington,[302] sought to change to at-large elections from ward voting. Upon submission to the Attorney General for section 5 preclearance, objections were interposed because the cities had failed to show that the changes would not have a discriminatory purpose or effect.

In 1962, the Mississippi Legislature enacted a statute requiring aldermen under a mayor-alderman form of government to be elected at large with the option of requiring aldermen to live in separate wards.[303] Prior to this legislation, cities with 10,000 or more residents were required to elect six aldermen from wards and one at large and those with under 10,000 residents had the option of choosing between ward or at-large voting.[304] Because the statue was enacted prior to November 1, 1964, it was not subject to section 5 preclearance.[305] In *Stew-*

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[297] *Id.* at 36.

[299] *Id. See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 271-72 (1975) (discussion of at-large elections in 13 Mississippi counties).

[299] Perkins v. Matthews, 400 U.S. 379, 394 (1971).

[300] Letter from David L. Norman, Assistant U.S. Attorney General, to W.H. Fedric, Grenada city attorney (Mar. 20, 1972).

[301] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to John D. Guyton, Kosciusko city attorney (Sept. 20, 1976).

[302] Letter from Drew S. Days, III, Assistant U.S. Attorney General, to J.R. Gilfoy, Lexington city attorney (Feb. 25, 1977). The Attorney General also objected to the city of Indianola's attempt to use numbered posts. Objection letter (Apr. 20, 1973).

[303] Act of May 24, 1962, ch. 956, 1962 Miss. Laws 956 (codified as amended at MISS. CODE ANN. § 21-3-7 (1972)).

[304] Stewart v. Waller, 404 F. Supp. 206, 209 (N.D. Miss. 1975).

[305] Before the 1982 amendments to § 2 of the Act, only those voting changes made after November 1, 1964, were subject to the "purpose or effect" criteria of the Act. With the addition of the "effect standard" to § 2, any voting procedures that have a discrimi-

art v. Waller,[306] however, black voters brought a class action suit challenging the 1962 statute as violative of the fourteenth and fifteenth amendments.[307] A three-judge court held the statute unconstitutional, finding that the legislation was a "purposeful device conceived and operated to further racial discrimination in the voting process."[308] Only those cities that had switched to at-large elections pursuant to the 1962 legislation were enjoined, while the constitutionality of the at-large systems in the other cities was to be decided on a case-by-case basis.[309]

The decision effectively foreclosed at-large city elections in at least forty-five cities.[310] Furthermore, the decision facilitated successful individual lawsuits brought against the at-large election of aldermen in Aberdeen,[311] Columbus,[312] Hazlehurst,[313] Picayune,[314] and Yazoo City.[315] In each case, the city settled the suit prior to trial and provided for the election of aldermen from wards.

Despite this success in challenging the at-large form of government, challenges to the commission form of government in Mississippi have not been as successful. Mississippi currently has eight cities[316] that operate under a commission in which the mayor and two commissioners, all elected at large, are full-time officials who perform both the

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natory effect may be challenged under the Act. *See supra* notes 181-82 and accompanying text. Thus, litigation involving election of city officials under forms of city government in existence prior to November 1, 1964, which were not previously under the scope of the Act, takes on special significance with the § 2 amendments.

[306] 404 F. Supp. 206 (N.D. Miss. 1975).

[307] *Id* at 209.

[308] *Id.* at 215.

[309] *Id.* at 215-18.

[310] Cities covered by the *Stewart* order are listed in 404 F. Supp. at 220.

[311] Fears v. City of Aberdeen, No. EC70-50-K (N.D. Miss. Sept. 26, 1977) (consent judgment).

[312] Edwards v. City of Columbus, No. EC-77-182-K (N.D. Miss. Sept. 16, 1978) (consent judgment).

[313] Jones v. City of Hazelhurst, No. J77-0159-C (S.D. Miss. Dec. 7, 1978) (consent judgment).

[314] Simmons v. City of Picayune, No. S77-0156-N (S.D. Miss. Apr. 28, 1980) (consent judgment).

[315] Williams v. City of Yazoo City, No. W76-28-R (S.D. Miss. Sept. 23, 1976) (consent judgment)

One other suit, brought against the City of Greenville's at-large election of council members in 1977, is still pending. Greenville Citizens for More Representative Govt. v. City of Greenville, No. GC-77-99-S (N.D. Miss. filed Aug. 30, 1977).

[316] The eight cities are Charleston, Clarksdale, Greenwood, Gulfport, Hattiesburg, Jackson, Laurel, and Vicksburg. Mississippi Municipal Association, Spring 1982.

executive and legislative functions of city government.[317]

The unsuccessful challenges in this area are due in large measure to the United States Supreme Court's ruling in *City of Mobile v. Bolden*,[318] in which the Court stated that multi-member legislative districts are not unconstitutional per se.[319] Because the *Bolden* Court required purposeful discrimination to establish fourteenth and fifteenth amendment claims,[320] challenges to the commissions in Jackson,[321] Greenwood,[322] and Hattiesburg[323] were unsuccessful.

Two significant events may effectively moot the *Bolden* decision: the addition of the "effects" standard to section 2 by the 1982 amendments;[324] and the United States Supreme Court decision in *Rogers v. Lodge*.[325] In *Rogers*, black citizens of Burke County, Georgia, challenged the at-large system of electing county commissioners as violative of the fourteenth and fifteenth amendments.[326] Although the election system was instituted in 1911 as a racially neutral system, both the district court and the court of appeals found that the at-large voting system was being *maintained* for a discriminatory purpose.[327]

While reiterating that fourteenth and fifteenth amendment voting

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[317] The commission form of government is authorized for Mississippi cities by MISS. CODE ANN. § 21-5-1 (1972).

All of the Mississippi cities currently utilizing a commission adopted that form of government prior to 1964; thus, it cannot be challenged under the Voting Rights Act. *See* Beer v. United States, 425 U.S. 130, 138 (1976) (practices instituted prior to November 1, 1964, are not subject to review under § 5).

[318] 446 U.S. 55 (1980).

[319] *Id.* at 66.

[320] *Id.* at 65-66.

[321] Kirksey v. City of Jackson, 506 F. Supp. 491, 502, 504 (S.D. Miss.), *aff'd*, 663 F. 2d 659 (5th Cir. 1981), *modified*, 669 F.2d. 316 (5th Cir. 1982).

[322] Jordan v. Greenwood, No. GC 77-51-WK-P35 (N.D. Miss. Mar. 23, 1982).

[323] A challenge to the Hattiesburg commission has been pending since 1977. Boykins v. City of Hattiesburg, No. H77-0062-C (S.D. Miss. filed May 27, 1977). A suit filed by the United States challenging the at-large commission in Hattiesburg as violative of the fourteenth and fifteenth amendments as well as § 2 of the Act was voluntarily dismissed after the Supreme Court rendered City of Mobile v. Bolden, 446 U.S. 55 (1980). United States v. City of Hattiesburg, H-78-0147(c) (S.D. Miss. July 8, 1980).

The city of Vicksburg agreed to divide the city into two districts for the election of commissioners after the city's 1974 annexation ordinance was challenged. Thomas v. City of Vicksburg, W-76-35-C (S.D. Miss. 1977).

[324] *See supra* notes 173-76 and accompanying text.

[325] 102 S. Ct. 3272 (1982).

[326] *Id.* at 3275.

[327] Lodge v. Buxton, 639 F.2d 1358, 1378-80 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982). *See generally* 51 MISS. L.J. 865 (1981) (discussing appeals court opinion).

challenges require a showing of purposeful discrimination,[328] the Court noted that a finding of discriminatory purpose would be considered a question of fact subject to the clearly erroneous standard of rule 52 of the Federal Rules of Civil Procedure.[329] After setting forth the district court's findings of fact,[330] the Court concluded that the factual findings were not clearly erroneous and that circumstantial evidence could be utilized to infer purposeful discrimination under the fourteenth and fifteenth amendments.[331] Because of the two significant changes in this area at least two commission opponents expect additional litigation against Jackson's city commission.[332]

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[328] 102 S. Ct. at 3275-76.

[329] *Id.* at 3278-79; *see* FED. R. CIV. P. 52.

[330] 102 S. Ct. at 3279-81.

[331] *Id.* at 3281. In *Rogers*, the Court considered the following factors significant in determining whether discriminatory intent was present:

(1) blacks constituted a majority of the county's population but a minority of the voting age population;
(2) there was overwhelming evidence of racial block voting;
(3) no blacks had ever been elected to the commission;
(4) blacks had less opportunity to participate in the political process and to elect candidates of their choice because of:
  (a) past discrimination in the political process, *e.g.*, literacy tests, poll taxes, and and white primaries, resulting in low black voter registration;
  (b) discrimination in education resulting from segregated schools, which gave blacks an inferior quality of education;
  (c) discrimination in the selection of grand juries, the hiring of county employees, and appointments to county boards and committees;
(5) the discriminatory practices were commonly utilized and were abandoned only as a result of court orders or civil rights legislation;
(6) elected officials were unresponsive to the needs of the black community; county services were not equally available to the black community and officials were reluctant to remedy black complaints voluntarily;
(7) the depressed socio-economic status of blacks in the county, evidenced by their significantly lower income and inferior education as well as the fact that blacks had completed less formal education than whites;
(8) the large geographic size of the county made it difficult for blacks to get to polling places or to campaign for office.

Id.

These factors are curiously similar to those present in City of Mobile v. Bolden, 446 U.S. 55, 73 (1980). In *Bolden*, a plurality found the factors insufficient to prove discriminatory intent. *Id.* The Court reconciled *Rogers* with *Bolden* by concluding that the district court opinion reversed in *Bolden* had applied a flawed legal standard when it considered proof of discriminatory effect sufficient to find a fourteenth amendment violation. 102 S. Ct. at 3277.

[332] State Senator Henry Kirksey expressed confidence that the Court's ruling in *Rogers* would be utilized in appealing the challenge to Jackson's commission. The Clarion-Ledger, July 2, 1982, at 1B, cols. 4 & 5. Senator Kirksey is the named plaintiff in the

3. At-Large School Board Elections

Section 5's preclearance requirements have also thwarted plans for at-large elections of school board members in twenty-one Mississippi counties. In 1975 and 1977, Mississippi submitted two 1966 statutes to the Attorney General for preclearance. These two statutes required at-large elections for county school board members in twenty-two counties.[333]

In the 1975 submission, the Attorney General made no objection to the at-large elections in Jackson County. In December 1975, however, he requested additional information for Hancock, Lafayette, Lincoln, and Neshoba Counties, and objected to the practice in seven counties, Benton, Bolivar, Kemper, Leake, Lowndes, Marshall, and Warren.[334] In the 1977 submission, the Attorney General also objected to the at-large election of school board members in ten other counties, Coahoma, DeSoto, Holmes, Humphreys, Leflore, Quitman, Sunflower, Tallahatchie, Tunica, and Yazoo.[335]

D. Local Redistricting and Municipal Annexations

The two types of Mississippi voting changes that have received the greatest number of objections involve city and county redistricting and municipal annexations. The Attorney General has interposed objections to fifteen city and county redistricting plans, fifteen municipal annexations, and two proposed city incorporations, which when added to the five objections to state legislative and congressional reapportionment plans, account for nearly one-half of all Mississippi objections.[336]

1. Local Redistricting

Because boards of supervisor districts serve as election districts

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class action challenge to Jackson's commission form of government. Kirksey v. City of Jackson, 461 F. Supp. 1281 (S.D. Miss. 1978), *aff'd*, 663 F.2d 659 (5th Cir. 1981), *modified*, 669 F.2d 316 (5th Cir. 1982). The attorney in *Kirksey* is Frank Parker of the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. Mr. Parker stated that the *Rogers* decision would force a re-opening of the Jackson case. The Clarion Ledger, July 2, 1982, at 1B, col. 2. Senator Kirksey was confident that the Court's ruling would be utilized in the appeal of the *Kirksey* case. *Id.* at 1B, cols. 4 & 5.

[333] Miss. Code Ann. §§ 37-5-13 to -15 (1972).

[334] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (Dec. 1, 1975).

[335] Letter from Drew S. Days III, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (July 8, 1977).

[336] *See supra* notes 221-22.

not only for county supervisors but also for county constables,[337] school board members,[338] justice court judges,[339] and county boards of election commissioners,[340] county redistricting[341] has been the focus of substantial interest. After the 1970 census, twelve section 5 objections were made to redistricting plans in ten counties.[342] In addition, private plaintiffs challenged plans in six counties. A challenge to the 1970 Adams County redistricting plan was found to be without merit,[343] but lengthy litigation in Forrest,[344] Grenada,[345] Hinds,[346] Leflore,[347] and Warren[348] Counties resulted in changes to the original plans.

Both Grenada and Warren Counties were parties to declaratory judgment suits in the District of Columbia district court. When Gre-

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[337] MISS. CODE ANN. § 19-19-1 (1972).

[338] *Id.* § 37-5-1.

[339] *Id.* § 9-11-1 (Supp. 1982).

[340] *Id.* § 23-5-3.

[341] County board of supervisor districts are subject to the one-man, one-vote requirement applicable to state legislative districts. Avery v. Midland County, 390 U.S. 474, 485 (1968). Thus, under state law, boards of supervisors are authorized to alter district boundaries to equalize population among the five districts to conform with the latest decennial census. MISS. CODE ANN. § 19-3-1 (Supp. 1982). Any redistricting plan must be precleared before it can be implemented. Georgia v. United States, 411 U.S. 526, 535 (1973).

[342] The counties were Attala (Sept. 3, 1974 letter), Copiah (Mar. 5, 1970 letter), Grenada (Aug. 9, 1973, and Mar. 30, 1976 letters), Hinds (July 14, 1971 letter), Leake (Jan. 8, 1971 letter), Marion (May 25, 1971 letter), Tate (Dec. 3, 1971, and Nov. 28, 1972 letters), Walthall (Nov. 27, 1978 letter), Warren (Apr. 4, 1971 letter) and Yazoo (July 16, 1971 letter). *See supra* note 222.

[343] *See* Howard v. Adams County Bd. of Supervisors, 480 F.2d 978, 980 (5th Cir. 1973) (districts were neither malapportioned nor dilutive of black voting strength), *cert. denied,* 415 U.S. 975 (1974); Howard v. Adams County Bd. of Supervisors, 453 F.2d 455, 458 (5th Cir.) (plaintiffs failed to prove purposeful racial discrimination or plan's unconstitutional dilution of black voting strength), *cert. denied,* 407 U.S. 925 (1972).

[344] United States v. Board of Supervisors, 571 F.2d 951, 956 (5th Cir. 1978) (case remanded to determine whether splitting black voters into four districts perpetuates past denial of access); United States v. Board of Supervisors (S.D. Miss. judgment of July 6, 1979) (district court ordered supervisors' revised plan implemented as court-ordered plan).

[345] *See infra* notes 349-51 and accompanying text.

[346] Kirksey v. Board of Supervisors, 554 F.2d 139, 151 (5th Cir.) (en banc) (plan, though racially neutral, will perpetuate past discrimination), *cert. denied,* 434 U.S. 968 (1977). The district court subsequently approved a plan submitted by the Board of Supervisors. Kirksey v. Board of Supervisors, 468 F. Supp. 285, 303 (S.D. Miss.), *appeal dismissed,* 608 F.2d 669 (5th Cir. 1979).

[347] Moore v. Leflore County Bd. of Election Comm'rs, 361 F. Supp. 603, 606-07 (N.D. Miss. 1971) (even though all five districts had black population majorities, plan diluted previous black voting strength).

[348] *See infra* notes 352-61 and accompanying text.

nada County attempted to utilize a 1972 redistricting plan to which an objection had been interposed, the United States successfully enjoined the use of that unprecleared plan in the 1975 elections.[349] The county subsequently sought preclearance through a declaratory judgment.[350] As a result of negotiations after the suit was filed, the county adopted a different redistricting plan, which was precleared by the Attorney General. Thereafter, the declaratory judgment suit was dismissed as moot.[351]

After receiving two objections from the Attorney General to its 1970 county redistricting plan,[352] the Warren County Board of Supervisors nevertheless utilized the plan for the 1971 elections. The Board sought reconsideration of the plan in 1973, but another objection was interposed.[353] The Attorney General subsequently filed suit to have the 1970 plan declared unenforceable and to have a new plan developed.[354] The three-judge court granted summary judgment for the United States, stayed the 1975 elections, and required the Board of Supervisors to submit a redistrictng plan for section 5 preclearance.[355] Two plans were informally submitted, to which the Attorney General indicated reservations. Thereafter, the district court adopted one of the county's plans after finding that it neither diluted black voting strength nor violated the one-man, one-vote requirement.[356]

The United States appealed, and the Supreme Court found that the local district court had exceeded the limits of its inquiry by deciding the constitutionality of both the 1970 plan and the court-adopted plan.[357] The local district court was limited to determining only whether the county could be enjoined from holding elections under a redistricting plan that had not been precleared.[358]

The following year the Board of Supervisors formulated a new redistricting plan and sought preclearance through a declaratory judg-

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[349] United States v. Grenada County Bd. of Supervisors, No. WC-75-44-K (N.D. Miss. May 30, 1975).

[350] Whitfield v. United States, No. 76-1636 (D.D.C. filed Sept. 1, 1976).

[351] *Id.* (Mar. 31, 1978).

[352] Letter from Jerris Leonard, Assistant U.S. Attorney General, to Warren County Board of Supervisors attorney Landman Teller (Apr. 4, 1971); Letter from David Norman, Assistant U.S. Attorney General, to Landman Teller (Aug. 23, 1971).

[353] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to Warren County Board of Supervisors attorney John W. Prewitt (Feb. 13, 1973).

[354] United States v. Board of Supervisors, No. 73W-48-N (S.D. Miss. 1973).

[355] United States v. Board of Supervisors, 429 U.S. 642, 644 (1977).

[356] *Id.*

[357] *Id.* at 646.

[358] *Id.*

ment in the District of Columbia district court.[359] The District of Columbia district court refused to approve the plan, and the Supreme Court affirmed.[360] Following rejection of the plan by the District of Columbia district court, a court-ordered plan was formulated with two black majority districts.[361] Only then, after eight years of litigation were county elections held for those officials elected from districts.

Three city redistricting plans have also been the subjects of section 5 objections since the 1970 census. After at-large voting for aldermen in the mayor-alderman form of government was prohibited for certain Mississippi cities in *Stewart v. Waller*,[362] the city of Canton found that its wards were malapportioned under the one-man, one-vote requirement. Less than three months prior to the municipal primary elections, Canton's mayor and aldermen adopted a redistricting ordinance and submitted it for preclearance. The Attorney General objected on April 13, 1977, because the city, in making a house count and estimating the number of persons per household, had used inaccurate population data in formulating its plan.[363] Subsequently, two class action lawsuits were filed challenging the apportionment of the wards.[364] A preliminary injunction, granted on May 2, 1977, enjoined the municipal elections,[365] and on July 5, 1977, the city was permanently enjoined from holding municipal elections under the existing wards.[366]

The city hired a consultant to prepare a new redistricting plan. On October 11, 1977, a plan consisting of six wards and one at-large district was adopted by the board of aldermen.[367] The district court directed the city to submit the plan for preclearance, and the city did so.[368] The Justice Department announced on December 15, 1978, that it would not interpose an objection.[369] But after the NAACP, as plaintiffs, continued to object to the plan, the district court found that the

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[359] Donnell v. United States, No. 78-0392 (D.D.C. filed Mar. 6, 1979).

[360] Donnell v. United States, 444 U.S. 1059 (1980).

[361] Stokes v. Warren County Election Comm'n, No. J79-0425(C) (S.D. Miss. Sept. 20, 1979).

[362] 404 F. Supp. 206, 215 (N.D. Miss. 1975); *see supra* notes 304-09.

[363] Letter from Drew S. Days III, Assistant U.S. Attorney General, to R.L. Goza (Apr. 13, 1977).

[364] Hinton v. Baldwin, No. J77-0136(R) (S.D. Miss. filed Apr. 22, 1977); Canton Branch, NAACP v. City of Canton, No. J77-0129(N) (S.D. Miss. filed Apr. 28, 1977).

[365] Canton Branch, NAACP v. City of Canton, 472 F. Supp. 859, 861 (S.D. Miss. 1979).

[366] *Id.*

[367] *Id.* at 864.

[368] *Id.* at 865-66.

[369] *Id.* at 866.

alleged dilution was not the result of any invidious discriminatory purpose and that the plan met constitutional standards.[370]

In 1980, the Attorney General also objected to a redistricting plan for the city of Batesville that was based on a house count similar to the one used in the Canton redistricting plan.[371] Batesville, which was 24.8% black in 1978, proposed one district that was 51.4% black; however, the plan had an overall population variance of 54% and was thus rejected, especially because the city had drafted a more acceptable alternate plan.[372] On February 12, 1981, the city submitted its alternate plan, which was approved.[373] In addition to the instances in Canton and Batesville, an objection was also interposed to a redistricting of Holly Springs city council districts on June 9, 1981.[374]

2. Municipal Annexations

In *Perkins v. Matthews*,[375] a 1971 case involving Canton, the United States Supreme Court held that municipal annexations were subject to preclearance under section 5.[376] Since *Perkins*, fifteen objections have been interposed to municipal annexations in Mississippi.[377]

Eight objections involved eight annexations by the city of Grenada between 1965 and 1973 that added only white residents. None of the annexations were precleared, and in 1973, a three-judge court enjoined implementation of another change until the city complied with section 5.[378] The city submitted its 1973 annexation, and the Attorney General objected, noting that the city had failed to submit its other annexa-

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[370] *Id.* at 875.

[371] Letter from Drew S. Days III, Assistant U.S. Attorney General, to Richard T. Phillips, Batesville city attorney (Sept. 29, 1980).

[372] *Id.*

[373] Letter from James P. Turner, Assistant U.S. Attorney General, to Richard T. Phillips, Batesville city attorney (Mar. 6, 1981).

[374] *See supra* note 222.

[375] 400 U.S. 379 (1971).

[376] *Id.* at 388. When an annexation is not precleared the annexation is invalid only as it affects voting; thus, while the annexed residents may receive city services and be subject to city taxes, they may not vote.

The consequences of annexing an area with a white majority in a city that utilizes at-large council elections may be cured by adopting a ward system for electing council members. City of Richmond v. United States, 422 U.S. 358, 370 (1975). Furthermore, if the redrawn districts fairly represent the political strength of the minority population after annexation, the annexation will not dilute black voting strength even though blacks constitute a smaller percentage of the population in the enlarged city. *Id.* at 370-71.

[377] *See supra* note 222.

[378] William Fredric, Grenada city attorney, Spring, 1982.

tions.[379] Grenada requested a reconsideration of the objection to the 1973 annexations and submitted the seven other annexations. These annexations were also objected to because the city had consistently annexed only white residents.[380] Following the annexation of a minority area into the Grenada city limits, objections to the annexations were withdrawn on June 25, 1976.[381]

Another objection by the Attorney General involved the city of Jackson's 1976 annexation of a forty square mile area that was 74% white.[382] Residents of the annexed area were allowed to vote in city elections, but their votes were counted only after it was determined that they would not affect the outcome of the election. Nearly five years later the objection was withdrawn by the Attorney General without any further action by the city. This withdrawal occurred because all black areas reasonably within the range of the annexation had been included, the dilution of the black voting strength was low (1.4%), and in absolute terms the size of the minority community had increased significantly.[383] Prior to the Jackson annexation, a May 1973 objection to a McComb annexation had similarly been retracted on September 12, 1973, without further action by the city.[384]

Two other objections to municipal annexations were withdrawn, but only after the cities had adopted single-member districts for city council elections. The first was an October 1, 1976, objection to an annexation by Vicksburg.[385] The city subsequently created two wards for the election of its two city commissioners, and as a result, the objection was withdrawn on April 28, 1977.[386]

The second objection involved the city of Kosciusko's expansion of its municipal boundaries in May 1966. In October 1966, the city sought preclearance by submitting the annexation to the Attorney General who requested additional information one month later. The city never supplied the information and allowed residents of the annexed areas to vote.

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[378] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to William Fedric, Grenada city attorney (Feb. 5, 1975).

[380] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to William Fedric, Grenada city attorney (May 2, 1975).

[381] *See supra* note 222.

[382] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to John E. Stone, Jackson city attorney (Dec. 3, 1976).

[383] Letter from James P. Turner, Acting Assistant U.S. Attorney General, to Howard C. Ross, Jr., Jackson city attorney (July 23, 1981).

[384] *See supra* note 222.

[385] *See supra* note 222.

[386] *See supra* note 222.

On May 9, 1977, the United States sought an injunction against both the city's allowing the residents of the annexed area to vote and the city's use of a malapportioned aldermanic plan.[387] The court ordered Kosciusko to submit a reapportionment plan and enjoined the annexation until the city gained preclearance. The city's new reapportionment plan became effective and was precleared.[388]

Finally, objections to three other annexations were met with compliance by the cities involved. In 1972, the town of Sidon annexed a totally white area but did not submit the change until 1977. The Attorney General interposed an objection primarily because of the anti-single shot voting requirement. The city complied with the objection without litigation.[389] The remaining two objections to municipal annexations were made in 1981 to a 1980 all-white annexation made by the city of Mendenhall, which elects its aldermen at large,[390] and to one of Indianola's four annexations.[391]

E. Objections to Redesignating Elective Offices

Section 5 objections involving Mississippi cities and counties have been made in response to the transformation of certain offices from elective to appointive positions. For example, in 1966, the Mississippi Legislature amended the Mississippi Code to require the appointment of the county superintendent of education in eleven specified counties.[392] Prior law had allowed counties the option of appointing or electing the superintendent. The Supreme Court held that this change was subject to section 5 preclearance,[393] and when the change was submitted, the Attorney General interposed an objection to the statute.[394] Nevertheless, Tunica County made the superintendent's office appointive and delayed submission of the change until 1976, at which time an objection was made.[395] Similarly, in 1973, the Attorney General ob-

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[387] United States v. City of Kosciusko, EC-77-72-K (N.D. Miss. Oct. 3, 1977).

[388] *Id.*

[389] *See supra* note 222.

[390] *See supra* note 222.

[391] *See infra* notes 508-24 and accompanying text.

[392] Act of June 17, 1966, ch. 406, 1966 Miss. Laws 744 (codified as amended at MISS. CODE ANN. § 37-5-67 (1972)).

[393] Allen v. State Bd. of Elections, 393 U.S. 544, 569-70 (1969).

[394] Letter from Jerris Leonard, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (May 21, 1969).

[395] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to John W. Dulaney (Jan. 24, 1977).

jected to the appointment of city clerks in Hollandale and Shaw.[396]

F. Changes in Polling Places

Section 5 objections have been made to changes in the locations of polling places, which were held subject to preclearance in *Perkins v. Matthews*.[397] Since *Perkins*, objections have been made regarding polling place changes in five Mississippi counties, Lafayette,[398] Marshall,[399] Tate,[400] Warren,[401] and Clay.[402]

In July 1975, a district court approved the relocation of polling places in Hinds County in conjunction with a court-ordered redistricting plan for supervisor districts.[403] Three years later, the Justice Department notified the county that twenty new polling places had not been precleared under section 5.[404] On October 3, 1978, the twenty new voting locations, plus twenty-nine other polling place changes, were submitted to the district court for approval. These twenty-nine other changes were required because of the owners' refusal to permit the continued use of their premises for voting, the demolition or remodeling of former polling places, and the recent availability of public schools as polling places.[405] The court ruled that the changes were subject to section 5 preclearance.[406] Thus, three weeks prior to the general election on October 16, 1978, the polling place changes were submitted for preclearance.

The Attorney General made no response to the submission prior to the election. At 9:30 p.m. on the evening before the elections, Charles Evers, a candidate for United States Senator, filed suit against the Hinds County Board of Supervisors seeking injunctive relief against use of the unprecleared polling places.[407] On January 6, 1979, the case

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[396] *See supra* note 222.

[397] 400 U.S. 379, 387-88 (1971).

[398] *See supra* note 222.

[399] *See supra* note 222.

[400] *See supra* note 222.

[401] *See supra* note 222.

[402] *See supra* note 222.

[403] Brief for Appellee, Evers v. Hinds County Bd. of Supervisors, No. 79-1428 (5th Cir. filed Jan. 19, 1979).

[404] Letter from Gerald W. Jones, Chief of the Voting Section, to Russel D. Moore III, Hinds County Board of Supervisors attorney (Sept. 20, 1978).

[405] Brief for Appellee, Evers v. Hinds County Bd. of Supervisors, No. 79-1428 (5th Cir. filed Jan. 19, 1979).

[406] *Id.*

[407] Evers v. Hinds County Bd. of Supervisors, No. J78-0484 (S.D. Miss. filed Nov. 6, 1978).

was dismissed as moot.[408] The Court of Appeals for the Fifth Circuit vacated the district court judgment and remanded the case on May 8, 1980.[409] The case is still pending.

G. *Voting Assistance to Blind, Disabled, and Illiterate Voters*

In addition to its prolonged legislative redistricting battle,[410] the state has also encountered multiple section 5 objections in other areas. One area concerned the legislature's repeal in 1965 of a law providing assistance to illiterate voters at the polls, an action that resulted in ten objections.

Under section 3273 of the 1942 Mississippi Code, a voter who declared his inabilty to read was given assistance in marking his ballot by an election manager.[411] During a three-week special session beginning June 14, 1965, the Mississippi Legislature repealed section 3273,[412] and submitted the change to the Attorney General, who objected.[413] Thereafter, both a three-judge district court[414] and the Mississippi Supreme Court[415] held the repeal ineffective, thus reinstating section 3273.

Until 1979, state statutes permitted blind and disabled voters to obtain assistance from an election manager or from a person of the voter's own choosing,[416] but illiterate voters were limited to receiving assistance from an election manager.[417] In a 1974 ruling applicable only to Humphreys County, the three-judge court held there was no compelling reason to distinguish between the types of assistance available to blind and disabled voters and to illiterate voters.[418] Three years

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[408] Brief for Appellee at 7, Evers v. Hinds County Bd. of Supervisors, No. 79-1428 (5th Cir. filed Jan. 19, 1979).

[409] Evers. v. Hinds County Bd. of Supervisors, 617 F.2d 292 (5th Cir. 1980).

[410] *See supra* notes 223-68 and accompanying text.

[411] Miss. Code Ann. § 3273 (1942), *repealed by* Act of June 30, 1965, ch. 19, 1965 Miss. Laws 40 (extraordinary session).

[412] Act of June 30, 1965, ch. 19, 1965 Miss. Laws 40 (extraordinary session).

[413] Letter from Jerris Leonard, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (May 26, 1969).

[414] United States v. Mississippi, 256 F. Supp. 344, 349 (S.D. Miss. 1966). The three-judge court held that if an illiterate voter requests reasonable assistance, precinct officials must comply with the voter's request. *Id.* at 349.

[415] O'Neal v. Simpson, 350 So. 2d 998, 1001 (Miss. 1977).

[416] Miss. Code Ann. § 23-5-157 (1972), *repealed by* Act of March 26, 1979, ch. 433, § 2, 1979 Miss. Laws 763.

[417] Miss. Code § 3237 (1942), *repealed by* Act of Mar. 26, 1979, ch. 433, § 2, 1979 Miss. Laws 763.

[418] James v. Humphreys County Bd. of Election Comm'rs, 384 F. Supp. 114, 132 (N. D. Miss. 1974).

later, in *O'Neal v. Simpson,*[419] the Mississippi Supreme Court ruled that illiterate voters should receive assistance similar to that provided to blind or disabled voters.[420] Thus, all three classifications of voters could obtain assistance from either an election manager or a person of the voter's own choosing.[421]

In 1979, the legislature responded to these decisions and repealed the statutes that differentiated between the types of assistance available to blind or disabled voters and to illiterate voters.[422] The new law provides the same assistance to blind, disabled, or illiterate voters.[423] This new Act permits an election manager or a person of the voter's own choosing to render assistance as long as the person chosen was a registered voter in the same precinct, the assistance was given in the presence of the manager, and the fact of assistance was noted on the poll book.[424] In addition, no person other than the election manager could aid more than five voters.[425] Upon submission, however, the Attorney General objected to this legislation because of the limitations placed on the selection of a person other than the election manager.[426]

H. Open Primary Law

To date, the Attorney General has interposed three objections to the state's open primary law.[427] In 1970, the Mississippi Legislature passed its first open primary law, which provided for a preferential election three weeks prior to the November general election in which all candidates, regardless of political affiliation, would run at the same time.[428] If no candidate received a majority of the votes cast, the two

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[419] 350 So. 2d 998 (Miss. 1977).

[420] *Id.* at 1003.

[421] *Id.*

[422] *See supra* notes 416-17 and accompanying text.

[423] Act of Mar. 26, 1979, ch. 433, § 1, 1979 Miss. Laws 763 (codified at MISS. CODE ANN. § 23-5-158 (Supp. 1982)).

[424] MISS. CODE ANN. § 23-5-158 (Supp. 1982).

[425] *Id.*

[426] Letter from Drew S. Days III, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (July 6, 1979).

It would thus appear that Mississippi is currently governed by the state supreme court ruling in *O'Neal v. Simpson, see supra* notes 419-21 and accompanying text, and that all three classifications of voters may select a person of their own choosing for voting assistance as was provided in former § 23-5-157.

[427] See generally LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *supra* note 219, at 72-79, which discusses the history of Mississippi's open primary legislation.

[428] Act of Apr. 6, 1970, ch. 506, 1970 Miss. Laws 766; Act of Apr. 6, 1970, ch. 508, 1970 Miss. Laws 779.

candidates receiving the highest number of votes would be candidates in the general election.[429]

The state submitted the legislation to the United States Attorney General for preclearance on July 23, 1970. In a response sixty days later, the Attorney General stated that the problems caused by the legislation were "extremely complex" and recognized that there were allegations that the purpose of the bills was to thwart the chances of black independant candidates in a general election. He also stated that there were no conclusive facts indicating that the acts were afflicted with a racially discriminatory purpose. Thus, within the sixty-day time period granted to the Attorney Genral for review, he was not prepared to make a determination of the validity of the legislation.[430]

Under the current interpretation of the law, the legislation would have been considered precleared,[431] as later Justice Department correspondence indicated.[432] But in *Evers v. State Board of Election Commissioners*,[433] a class action suit filed to enjoin the open primary law, a three-judge court held that because the Attorney General had not discharged the duties imposed on him either to approve or to disapprove the legislation, the law could not become effective.[434]

Thereafter, the state again submitted the same legislation[435] for preclearance on February 25, 1974. The Attorney General noted that the Justice Department had considered the legislation precleared because of the failure of the Attorney General to object within sixty days, but because the state had failed to perfect an appeal of the three-judge court ruling, it would stand.[436] Thus, finding that the changes would dilute black voting strength, the Attorney General objected.[437]

Two years later, the Mississippi Legislature, bolstered by the preclearance of a Louisiana open primary bill, passed legislation nearly identical to the 1970 Act but excluded from the later act federal elec-

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[429] Act of Apr. 6, 1970, ch. 508, § 3, 1970 Miss. Laws 779.

[430] Letter from Jerris Leonard, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (Sept. 20, 1970).

[431] *See, e.g.*, Morris v. Gressette, 432 U.S. 491, 502 (1977) (covered jurisdiction is in compliance with § 51 if complete submission is filed but no objection is received from Attorney General within 60 days); *see supra* note 51 and accompanying text.

[432] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (Apr. 26, 1974).

[433] 327 F. Supp. 640 (S.D. Miss. 1971).

[434] *Id.* at 644.

[435] *See supra* notes 428-29 and accompanying text.

[436] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (Apr. 26, 1974).

[437] *Id.*

tions, as had the Louisiana law.[438] The legislation was submitted for section 5 preclearance and the Attorney General again objected for the same reasons that invalidated the 1970 legislation.[439]

Three years later the legislature again passed basically the same open primary legislation.[440] Noting that the legislation was nearly identical to the previously submitted bills, the Attorney General interposed an objection after finding that the law substantially reduced the role of political parties in Mississippi and required a candidate to gain a majority of the votes in the general election rather than a plurality, which had been sufficient under previous law.[441]

The state subsequently filed suit for a declaratory judgment in the District of Columbia district court. The suit is still pending.[442] During the 1982 session, however, the legislature repealed the open primary bill and passed legislation requiring that the primary elections be held seven weeks prior to the general election in order to shorten the length of the campaign.[443] The bill also provides for a common qualifying date for all candidates, thirty days before the date of the party primaries.[444]

I. 1982 Congressional Reapportionment Plan

The state's 1982 congressional reapportionment plan generated the most recent objection by the Justice Department to a change in Mississippi's voting procedure.[445] The reapportionment plan was submitted to the United States Attorney Genral on November 10, 1981. Sixty days after receiving the submission, the Attorney General requested additional information.[446]

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[438] Act of May 25, 1976, ch. 485, § 1, 1976 Miss. Laws 811.

[439] Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to Mississippi Attorney General A. F. Summer (Aug. 23, 1976); *see supra* text accompanying note 430.

[440] Act of Mar. 30, 1979, ch. 452, 1972 Miss. Laws 834.

[441] Letter from Drew S. Days, III, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (June 11, 1979).

[442] Mississippi v. United States, No. 79-3469 (D.D.C. filed Dec. 27, 1979).

[443] Act of Apr. 22, 1982, ch. 477, §§ 1-3, 7, 1982 Miss. Gen. Acts No. 11 at 50, 50, 52. Currently, primaries for United States Congress and Senate elections are held in June, and primaries for state and county officials are in August, with the general election for both in November.

[444] Act of Apr. 22, 1982, ch. 477, § 3, 1982 Miss. Gen Acts No. 11 at 50, 51.

[445] Letter from William Bradford Reynolds, Assistant U.S. Attorney General, to Jerris Leonard, special counsel for Mississippi (Mar. 30, 1982).

[446] Letter from William Bradford Reynolds, Assistant U.S. Attorney General, to Jerris Leonard, special counsel for Mississippi (Jan. 11, 1982). The Attorney General requested information regarding an analysis of the Delta congressional districts in 1965, in 1966 after reapportionment, and in 1972 after reapportionment, utilizing population

Subsequently, the Attorney General notified the state that although the 1972 congressional redistricting plan on which the 1982 plan was based had been precleared,[447] the preclearance of the 1972 plan had been erroneous.[448] The Attorney General noted that the 1966 plan, the first in eighty-five years not containing a Delta district, was never submitted for section 5 preclearance. Rather, the 1966 plan was found constitutional by a Mississippi district court.[449] In addition, the Attorney General concluded that because the 1972 Attorney General's approval was based solely on the 1966 district court approval of the earlier plan rather than on an independent review of the merits, the 1972 approval was improper.[450] Therefore, no congressional reapportionment plan in Mississippi had been effectively scrutinized under section 5, and the Justice Department would not be bound by the Mississippi district court's approval of the 1966 plan or by the Attorney General's approval of the 1972 plan.[451]

At the same time, the Attorney General found that the 1981 reapportionment plan fragmented the state's Delta area. In the objection letter, the Attorney General noted that the first, second, and third congressional districts were "drawn horizontally across the majority-black Delta area in such a manner as to dismember the black population concentration and effectively dilute its voting strength."[452]

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figures from the 1960, 1970, and 1980 censuses. *Id.*

[447] In 1972, the Attorney General notified Mississippi that he would not object to a 1972 congressional redistricting plan, which was based on a 1966 plan that had been declared constitutional in Connor v. Johnson, 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd*, 368 U.S. 483 (1967). Letter from David L. Norman, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Summer (May 30, 1972).

[448] Letter from William Bradford Reynolds, Assistant U.S. Attorney General, to Jerris Leonard, special counsel for Mississippi (Mar. 30, 1982).

[449] Connor v. Johnson, 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd*, 368 U.S. 483 (1967).

[450] Letter from William Bradford Reynolds, Assistant U.S. Attorney, to Jerris Leonard, special counsel for Mississippi (Mar. 30, 1982).

[451] *Id.* The 1981 plan developed by the legislature was predicated on the fact that the 1972 plan had been precleared, and thus the 1981 "least change" plan was developed by simply conforming the 1972 plan to the populations necessary to meet the one-man, one-vote mandate of Reynolds v. Sims, 377 U.S. 533 (1964).

[452] Letter from William Bradford Reynolds, Assistant U.S. Attorney General, to Jerris Leonard, special counsel for Mississippi (Mar. 30, 1982).

Three months after receiving the § 5 objection to its congressional redistricting plan, the state submitted its plan for reapportionment of the state legislature. Following the pattern exhibited in its review of the congressional redistricting plan, the Justice Department requested additional information five days before the end of the sixty-day review period. Letter from William Bradford Reynolds, Assistant U.S. Attorney General to Jerris Leonard, special counsel for Mississippi (Aug. 25, 1982). The state provided the requested information, and to eliminate the delays experienced in the congressional redis-

Seven days after receiving the objection letter, the state filed suit in the District of Columbia district court seeking preclearance through a declaratory judgment.[453] Two suits, later consolidated, were also filed by private litigants seeking an injunction against use of the new plan and requesting a court-ordered plan for the June 1, 1982, congressional elections.[454]

In this private litigation, the plaintiffs sought adoption of the "Kirksey plan," which created a 64.37% black majority Delta district by combining a portion of the city of Jackson with fourteen Delta and part-Delta counties and two non-Delta counties.[455] The state had requested the court to order as an interim plan the 1981 redistricting plan to which the Attorney General had interposed an objection, the existing 1972 redistricting plan, or a plan drawn by the court, modifying one of the two.[456] The 1981 plan created two districts with 47.95% and 45.32% black populations but no district with a majority black population.[457] The AFL-CIO, as amicus curiae, urged the court to adopt a plan introduced during the special legislative session by Representative James Simpson that created a Delta district with a 53.77% black majority.[458]

Noting that the 1981 plan had been objected to and that the 1972 existing plan had an unconstititutional population deviation of 17.6%,

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tricting process in the event that the Attorney General objected to the legislative reapportionment plan, the state filed suit in the District of Columbia district court for a declaratory judgment respecting the same legislative redistricting plan. Mississippi v. United States, No. 82-2673 (D.D.C. filed September 20, 1982). On November 22, 1982, the Attorney General notified the state that he would not interpose an objection to the legislative redistricting plan. Letter from William Bradford Reynolds, Assistant U.S. Attorney General to Jerris Leonard, special counsel for Mississippi (Nov. 22, 1982). Ten days later, the Justice Department and the state of Mississippi filed a joint motion to dismiss the District of Columbia district court case as moot inasmuch as the legislative plan at issue in the declaratory judgment suit had been precleared by the Attorney General. Mississippi v. United States, No. 82-2673 (D.D.C. filed December 2, 1982).

[453] Mississippi v. Smith, 541 F. Supp. 1329 (D.D.C. 1982). Bringing an action in the District of Columbia district court is the sole means available for contesting an Attorney General's objection.

[454] Jordan v. Winter, 541 F. Supp. 1135 (N.D. Miss. 1982), *appeal filed sub nom.*, Brooks v. Winter, No. 82-233, 51 U.S.L.W. 3120 (filed Aug. 10, 1982). After the cases were consolidated, a hearing was held on May 13 and 14, 1982, during which both sides presented ideas to the three-judge court for an interim redistricting plan to be used for the 1982 congressional elections. 541 F. Supp. at 1138.

[455] 541 F. Supp. at 1140.

[456] *Id.* at 1141.

[457] *Id.* at 1139.

[458] *Id.* at 1141.

the three-judge court observed that any plan it chose to implement had to satisfy the one-man, one-vote requirement and had to avoid any dilution of minority voting strength.[459] Furthermore, under the Supreme Court's decision in *Upham v. Seamon*,[460] the court was required to adhere to the state's political policies unless those policies violated either the Constituition or the Act.[461] These policies were summarized as follows: (1) minimal change from 1972 district lines, (2) least possible population deviation, (3) preservation of the electoral base of incumbent congressmen, and (4) establishment of two districts with forty percent or better black population.[462]

Because the state was not required to search for ways to maximize the number of black voting population districts, the court held that the fourth policy, based on the legislature's view that the sacrificing of two forty percent "high impact" districts for one district with a significant black majority would result in less sensitivity to the needs and interests of the state's black constituency, was valid.[463] The court further observed that the "Kirksey plan" eroded the electoral bases of incumbent congressmen in two districts, disregarded the state's policy of creating two high black impact districts, and constituted an "obvious racial gerrymander" that encompassed a portion of the city of Jackson solely to create a large "black population corridor having little in common with the rest of what is essentially a rural district."[464]

The court adopted the "Simpson plan"[465] after finding that it fairly accorded both with the state's policies and with racial fairness.[466] The court also rejected the plaintiffs' contention that any district with less than a 65.51% black majority, the racial makeup of the 1965 Delta district, would constitute retrogression.[467] Although the 1962 Delta district in force at the time of the enactment of the Act had a 59.29% black majority, computations using the 1980 census figures and the same configuration of the district as it existed in 1962 revealed that the black population would now equal only 48.09% of the district.[468] Thus,

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[459] *Id.* at 1142.

[460] 102 S. Ct. 1518 (1982).

[461] Jordan v. Winter, 541 F. Supp. 1135, 1142 (N.D. Miss. 1982), *appeal filed sub nom.*, Brooks v. Winter, No. 82-233, 51 U.S.L.W. 3120 (filed Aug. 10, 1982).

[462] 541 F. Supp. at 1143.

[463] *Id.*

[464] *Id.* at 1144.

[465] *See supra* text accompanying note 458.

[466] 541 F. Supp. at 1144.

[467] *Id.*

[468] *Id.*

the "Simpson plan," with a 53.77% black majority, represented an enhancement rather than a diminution of black voting strength.[469]

Before this private litigation began, the court ordered an indefinite postponement of the congressional primary elections pending further court action.[470] After adopting the "Simpson plan" and considering the time requirements for candidate qualification and campaigning, the court devised a schedule for the 1982 congressional primary and general elections.[471] The first primary elections were set for August 17, 1982.[472]

Three weeks later, in *Mississippi v. Smith*,[473] after a hearing on the state's motion for partial summary judgment in the declaratory judgment suit,[474] the District of Columbia district court held that the state would be required to show at a minimum that the legislature's plan was not retrogressive relative to the interim plan adopted by the three-judge Mississippi court.[475] Because the interim plan created one majority black district and the legislative plan contained none,[476] the

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[469] *Id.* The *Jordan* plaintiffs' request for a stay and an injunction against use of the plan in the August primaries was denied. Brooks v. Winter, 102 S. Ct. 2953 (1982).

[470] Jordan v. Winter, 541 F. Supp. at 1138.

[471] *Id.* at 1144-45.

[472] *Id.* at 1145.

[473] 541 F. Supp. 1329 (D.D.C. 1982).

[474] The state sought to have retrogression measured by comparison of the 1981 plan with the congressional districts that were adopted in 1972 and that were used for congressional elections from 1972 through 1980. *Id.* at 1330. The state also sought, through a motion in limine, to limit "the evidence on the issue of discriminatory purpose to the legislative process in 1981 which culminated in the development and enactment of the 1981 plan." *Id.*

[475] *Id.* at 1333.

[476] The racial makeup of the two plans is as follows:

1981 plan devised by legislature:

Congressional District	Total Population	Deviation	% Deviation	Black %
1	504,107	- 21	-.0042	29.79
2	504,024	-104	-.0206	47.95
3	504,237	+109	+.0216	33.38
4	504,123	- 5	-.0010	45.32
5	504,147	+ 19	+.0038	19.54

Simpson plan (adopted by the Mississippi three-judge court):

District	Population	Deviation	% Deviation	Black %
1	504,671	+543	+.1077	25.86
2	504,697	+569	+.1128	53.77
3	504,760	-368	-.0729	31.23

burden was rather insurmountable.

In addition, the court declined to determine without a full hearing whether the 1972 plan, the 1966 plan, or any prior plan would serve as a benchmark for measuring retrogression.[477] Because the 1972 plan had never received an independent review on the merits under section 5,[478] and because it was retrogressive when compared to the districts in effect on the effective date of the Act, the court questioned whether the 1972 plan could serve as a benchmark for measuring the possible discriminatory effect of subsequent plans.[479]

Thus, in light of the District of Columbia district court's ruling, the state signaled its intention to delay the remainder of the trial until at least January 1983, to give the legislature an opportunity to determine whether to pursue the suit.[480] Two weeks later, however, the state announced that the District of Columbia court's ruling would be appealed to the United States Supreme Court.[481]

The section 5 objections recounted above have resulted in various degrees of interruptions in the electoral processes in Mississippi. For example, county officials in Warren County were "frozen" in office for eight years. There was no election for supervisor or any other county official elected from supervisor districts in Warren County after the 1971 elections until 1979. Thus, officials elected in 1971 served an extra four-year term without being elected.[482]

There have been other disruptions of the electoral process. New elections were ordered in Lowndes,[483] Issaquena,[484] Monroe,[485] and Le-

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4	504,893	-235	-.0466	45.25
5	504,617	-511	-.1013	19.84

Jordan v. Winter, 541 F. Supp. 1135, 1139 (N.D. Miss. 1982), *appeal filed sub nom.*, Brooks v. Winter, No. 82-233, 51 U.S.L.W. 3120 (filed Aug. 10, 1982).

[477] 541 F. Supp. at 1333.

[478] *See supra* text accompanying notes 450-51.

[479] 541 F. Supp. at 1333.

[480] The Clarion Ledger, July 8, 1982, at 3A, col. 4 (statements of Mississippi's governmental leaders).

[481] Notice of appeal was filed with the United States Supreme Court. Mississippi v. Smith, No. 82-0956 (U.S. filed July 28, 1982).

[482] *See supra* text accompanying notes 352-61.

[483] *See* Keller v. Gilliam, 454 F.2d 55, 57 (5th Cir. 1972) (Lowndes County supervisors elected at-large in 1971 did not serve full four-year term; new elections were held in 1972).

[484] Hall v. Issaquena County Bd. of Supervisors, 453 F.2d 404, 404-05 (5th Cir. 1971) (new elections under correct redistricting plan to be held in summer 1972 to replace supervisors elected in 1971).

[485] Taylor v. Monroe County Bd. of Supervisors, 421 F.2d 1038, 1042-43 (5th Cir. 1970) (new elections for supervisor held after redistricting pursuant to court order).

flore Counties,[486] as well as in the city of Canton,[487] following objections to at-large voting practices. Additionally, citizens in annexed areas of Indianola were precluded from voting in municipal elections.[488]

Private litigants in Mississippi have challenged not only the voting-law changes to which objections were interposed,[489] but also to those changes that were precleared.[490] The United States has been a plaintiff in suits seeking to enforce section 5 objections in the state,[491] just as it has been made a defendant as state and local officials sought declaratory judgments in the District of Columbia district court.[492] This litigation has been time consuming and financially burdensome, especially because attorney's fees are recovered when a plaintiff succeeds in a challenge under the Act.[493] Thus, in many instances Missis-

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[486] Moore v. Leflore County Bd. of Election Comm'rs, 361 F. Supp. 609, 614 (N.D. Miss. 1973) (special election for new supervisors to be held summer 1973).

[487] *See* Canton Branch, NAACP v. City of Canton, 472 F. Supp. 859, 863 (S.D. Miss. 1979) (1977 municipal elections enjoined after Attorney General objected to city redistricting plan). For a discussion of the injunction against the city of Canton's municipal elections, see *supra* text accompanying notes 289-306. For a discussion by the Fifth Circuit on discriminatory practices that invalidate primary elections, see generally Toney v. White, 488 F.2d 310, 312-14 (5th Cir. 1973).

[488] In 1981, 1901 white residents of Indianola were precluded from voting in municipal elections because of the Attorney General's objection to their annexation into the city. *See infra* notes 508-24 and accompanying text.

[489] *See, e.g.*, Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978) (class action suit to enjoin use of election statute); Dyer v. Love, 307 F. Supp. 974, 975 (N.D. Miss. 1969) (suit against use of at-large supervisor elections); Mississippi Democratic Party v. Johnson, 299 F. Supp. 93, 94 (S.D. Miss. 1969) (class action suit to force preclearance of 1966 amendment to state constitution allowing consolidation of counties).

[490] *See, e.g.*, Canton Branch, NAACP v. City of Canton, 472 F. Supp. 859, 863 (S.D. Miss. 1979) (challenge to redistricting plan); Crowe v. Lucas, 472 F. Supp. 937, 939 (N. D. Miss. 1979) (challenge to new voter registration).

[491] *See, e.g.*, United States v. Board of Supervisors, 429 U.S. 642, 643-44 (1977); United States v. Board of Supervisors, 571 F.2d 951, 953 (5th Cir. 1978); United States v. City of Kosciusko, EC 77-72-K (N.D. Miss. May 9, 1977); United States v. Bolivar County, DC 75-52-K (N.D. Miss. March 29, 1976); United States v. Grenada County Bd. of Supervisors, WC 75-44-K (N.D. Miss. May 30, 1975).

[492] *See, e.g.*, Mississippi v. Smith, 541 F. Supp. 1329, 1330 (D.D.C. 1982); Mississippi v. United States, No. 79-3469 (D.D.C. filed December 27, 1979); Mississippi v. United States, 490 F. Supp. 569, 583 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980); Donnell v. United States, No. 78-0392 (D.D.C. July 31, 1979), *aff'd*, 444 U.S. 1059 (1980); Whitfield v. United States, No. 76-1636 (D.D.C. March 31, 1978).

[493] 42 U.S.C. § 1973*l*(e) (1976) provides the following: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

sippi taxpayers have paid not only for the lawyer defending the political entity,[494] but also for the lawyer representing the plaintiffs as well.[495]

The positive effects of the Act in Mississippi have been recounted earlier in this comment.[496] Certainly the Act's major thrust, the elimination of inequitably applied standards for voter registration and participation,[497] has significantly increased black involvement in Mississippi's electoral process. Assessing the effect of the objections interposed under section 5 or the litigation pursuant to the Act, however, is more difficult. For example, at-large supervisor elections or county redistricting plans have been challenged by either Attorney General objections or private litigation in twenty-one counties.[498] In

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[494] *See supra* note 260 and accompanying text.

[495] *See, e.g.*, Fairley v. Patterson, 493 F.2d 598, 607 (5th Cir. 1974) (attorney's fees plus costs of developing reapportionment plan to be awarded in Forrest County redistricting suit); Connor v. Winter, 519 F. Supp. 1337, 1339 (S.D. Miss. 1981) ($127,687 awarded to Lawyer's Committee in state reapportionment challenge); Latham v. Chandler, 406 F. Supp. 754, 757 (N.D. Miss. 1976) ($1,380 awarded to plaintiff's attorney in suit to enjoin Leflore County registrar from treating student voter applicants differently from other applicants); Dyer v. Love, 307 F. Supp. 974, 987 (N.D. Miss. 1969) (attorney's fee awarded to plaintiff's attorney in Washington County redistricting suit). *But cf.* Donnell v. United States, 682 F.2d 240, 248-49 (D.C. Cir. 1982) (upon successful defense by the Justice Department of a § 5 declaratory judgment suit, intervenor should be allowed attorney's fees only if it contributed substantially to the success of the litigation).

[496] *See supra* notes 3-5 and accompanying text.

[497] *See supra* notes 26-27, 44-47 and accompanying text.

[498] A list of these 21 counties and the objections or private litigation or both involving each includes the following:

County	Objections	Litigation
Adams		2
Attala	2	
Bolivar		1
Carroll	1	
Coahoma	1	
Copiah	1	
Forrest		2
Grenada	3	1
Hinds	1	1
Issaquena		1
Itawamba	1	1
Leake	1	
Leflore		1
Lowndes		1
Marion	1	
Tate	2	
Tishomingo	1	

1980, more than two-thirds of the 112 black county officials elected from supervisors' districts[499] were elected in counties where there had been no challenges.[500] Likewise, in 1980, three-fifths of the black education officials[501] and ninety-five percent of the black municipal officials[502] were members of school boards or city governing bodies that had not been subject to either litigation or objections under section 5.

These statements are not intended to diminish the importance of section 5's preclearance requirements. But the effect on Mississippi of the permanent provisions of the Act that ensure that minorities have an opportunity to participate effectively in the election process by registering and voting[503] should not be overlooked. At least in terms of the number of black elected officials, the permanent provisions appear to have had equal, if not greater, significance than the preclearance features.

Walthall	1	
Warren	1	
Washington		1
Yazoo	1	
	18	12

See supra notes 222, 269-98, 337-74 and accompanying text.

[499] The officials counted in this figure include county supervisors, justice court judges, constables, and election commissioners. *See* 10 JOINT CENTER FOR POLITICAL STUDIES, *supra* note 4, at 159-61, 166-68.

[500] In 1980, the "non-challenged" counties, with the number of black county officials elected from each district, included the following: Amite (1), Benton (1), Claiborne (15), Clay (2), Holmes (10), Humphreys (3), Jackson (1), Jefferson (17), Madison (2), Marshall (9), Noxubee (1), Oktibbeha (1), Quitman (2), Scott (2), Sharkey (2), Tallahatchie (1), and Wilkinson (9). *See id.* at 159-61.

[501] In 1980, 74 black education officials were school board members or school superintendents in 37 different school districts. Of that number, 44 were members of "non-challenged" boards. *See id.* at 168-71.

[502] The cities to which objections have been interposed are Batesville, Canton, Grenada, Hollandale, Holly Springs, Indianola, Kosciusko, Lexington, Mendenhall, Orange Grove, Pearl, Shaw, Sidon, and Vicksburg. *See supra* notes 222, 229-315 and accompanying text. In 1980, only 8 of Mississippi's 164 black municipal officials resided in these towns. *See* 10 JOINT CENTER FOR POLITICAL STUDIES, *supra* note 4, at 161-66. Because the objections to annexations in McComb and Jackson were withdrawn upon reconsideration by the Justice Department, these two cities are not counted in the statistics. *See supra* notes 222 and accompanying text.

The most successful municipal litigation in Mississippi was the fourteenth and fifteenth amendment challenge to the at-large election of city aldermen in Mississippi. Stewart v. Waller, 404 F. Supp. 206, 209 (N.D. Miss. 1975). Twenty-three black municipal officials, or 14% of the total, have been elected in cities covered by the *Stewart* order. *See* 10 JOINT CENTER FOR POLITICAL STUDIES, *supra* note 4, at 161-66; *infra* notes 310-15.

[503] 42 U.S.C. §§ 1973, 1973a, 1973d-1973*l* (1976 & Supp. IV 1980); *see supra* note 6.

J. Unprecleared Election Practices

A major reason advanced for retaining federal supervision over Mississippi's electoral process[504] is based on the state's enactment of voting changes without first complying with the preclearance requirements of section 5.[505] Five unprecleared practices in Mississippi have

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[504] *See supra* text accompanying note 220.

[505] In 1975, according to a preliminary Justice Department Survey, Mississippi had failed to submit 14 statutes for preclearance prior to their enactment. Letter from J. Stanley Pottinger, Assistant U.S. Atty Gen., to Mississippi Attorney General A.F. Summer (Mar. 17, 1975).

The following is a list of the unsubmitted legislation: Act of Apr. 6, 1973, ch 961, 1973 Miss. Laws 131 (allowing election to be held in Longview Center Building for South Longview Precinct, Oktibbeha County); Act of Apr. 16, 1973, ch. 493, 1973 Miss. Laws 669 (provides for incorporation of districts in more than one county in order to maintain water, sewer, garbage and waste collection and disposal systems, and fire protection facilities); Act of Mar. 29, 1973, ch. 421, 1973 Miss. Laws 495 (adding chancellorship in sixteenth Chancery Court District and providing for special election to fill the position); Act of Mar. 23, 1973, ch. 352, 1973 Miss. Laws 380 (providing that term of all state officers except governor shall begin on first Wednesday after first Monday in January); Act of May 22, 1972, ch. 512, 1972 Miss. Laws 787 (allowing voter to place voting machine ballots in ballot box without first placing it in an envelope); Act of May 8, 1972, ch. 466, 1972 Miss. Laws 590 (requiring that deaths of voting age residents in county be reported to county election commission by local registrar at least monthly); Act of May 2, 1972, ch. 435, 1972 Miss. Laws 512 (enlarging powers of Mississippi Coast Coliseum Commissioner, increasing bond of its appointed members, and providing for their removal for conviction of a felony or failure to attend three consecutive meetings without just cause); Act of Apr. 24, 1972, ch. 366, 1972 Miss. Laws 401 (requiring county board of supervisors to pay for political party primary elections); Act of Apr. 11, 1972, ch. 329, 1972 Miss. Laws 342 (creating the Bienville Recreational District composed of counties in East Mississippi and providing for its governing body); Act of Feb. 7, 1972, ch. 301, 1972 Miss. Laws 228 (increasing the membership of the State Executive Committee and reflecting reapportionment among the multi-county districts); Act of Apr. 5, 1971, ch. 494 1971 Miss. Laws 617 (setting the time for special municipal elections, providing the method and fee for qualifying and establishing run-off procedure); Act of Mar. 31, 1971, ch. 479, 1971 Miss. Laws 584 (allowing petitions calling for elections on county bond issues to be signed by the lesser of 1500 or 20% of the qualified electors); Act of Mar. 23, 1971, ch. 413 1971 Miss. Laws 435 (prohibiting residents residing within municipal school districts in certain counties from voting in the county superintendent of education election); Act of Mar. 17, 1971, ch. 381, 1971 Miss. Laws 397 (providing for additional Chancery judge for the Fifth Chancery District and describing procedure for special election of judge). Letter from J. Stanley Pottinger, Assistant U.S. Attorney General, to Mississippi Attorney General A.F. Sumner (Mar. 17, 1975).

An examination of the statutes indicates the expansive interpretation the Justice Department has applied to the phrase "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting." 42 U.S.C. § 1972c (1976). In several instances it is difficult to determine how the particular statutes enumerated in Mr. Pottinger's letter affect voting. For example, both the act that changed the begin-

provided the United States Supreme Court with an opportunity to discuss the scope of the coverage of section 5[506] and at least thirteen other unprecleared practices have precipitated litigation in the lower courts.[507]

The most recent example of a political subdivision's failure to preclear is Indianola's four annexations between 1965 and 1967.[508] According to 1980 census figures, the annexations added a significant number of residents. The May 25, 1965, annexation added 1,901 whites and no non-whites[509] and the combined annexations of May 4, 1966,

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ning of state officials' term of office from the "first Monday after the House of Representatives certifies the election" (the first Monday after the first Monday in January) to the first Wednesday after the first Monday in January, and the act that enhanced the powers of an *appointive* body and provided for the removal of its members, appear to have little to do with voting.

[506] *See* Perkins v. Matthews, 400 U.S. 379, 387-88 (1971) (changing the location of polling places and changing city boundary lines by annexations are covered by the preclearance requirements of § 5); Allen v. State Bd. of Elections, 393 U.S. 544, 550-51 (1969) (switching from district to at-large elections of county supervisors, requiring county superintendents of education to be appointed rather than elected, and increasing the qualifications for independent candidates are all subject to preclearance).

[507] Evers v. Hinds County Bd. of Supervisors, 617 F.2d 292, 292 (5th Cir. 1980) (challenge to polling places not precleared prior to 1978 United States Senate elections); United States v. Board of Supervisors, 571 F.2d 951, 953 (5th Cir. 1978) (challenge to unprecleared court-ordered redistricting plan); Thompson v. Brown, 434 F.2d 1092, 1095 (5th Cir. 1970) (composition of tribunal established to hear election challenges changed by state legislature); Dotson v. City of Indianola, 521 F. Supp. 934, 935 (N.D. Miss. 1981) (failure to preclear annexations); Jordan v. Cagle, 474 F. Supp. 1198, 1208 (N.D. Miss. 1979) (change in school board personnel policy governing leaves of absence), *aff'd*, 620 F.2d 298 (5th Cir. 1980); Crowe v. Lucas, 472 F. Supp. 937, 941 (N.D. Miss. 1979) (challenge to precleared voter registration purge); Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 768 (N.D. Miss. 1978) (switching from district to at-large election of county board of education members); United States v. City of Kosciusko, No. EC 77-72-K (N.D. Miss. May 9, 1977) (use of unprecleared annexation); United States v. Bolivar County, No. DC 75-52-K (N.D. Miss. March 29, 1976) (changing from single member to at-large election of county board of education); United States v. Grenada County Bd. of Supervisors, No. WC-75-44-K (N.D. Miss. May 30, 1975) (use of county redistricting plan that was objected to); Moore v. Leflore County Bd. of Election Comm'rs, 351 F. Supp. 848, 849 (N.D. Miss. 1971) (changing from district to at-large elections of county supervisors); Evers v. State Bd. of Election Comm'rs, 327 F. Supp. 640, 642-43 (S.D. Miss 1971) (challenge to state's open primary law); Mississippi Freedom Democratic Party v. Johnson, 299 F. Supp. 93, 94 (S.D. Miss. 1969) (amendment to state constitution allowing consolidation of counties).

[508] Dotson v. City of Indianola, 521 F. Supp. 934, 939 (N.D. Miss. 1981). Prior to 1965, Indianola had a total population of 6714, with non-whites comprising 56.0% of the total. By 1980, only 4826 persons resided within the preannexation area of the city, 55.5% of whom were non-white. *Id.* at 938-39.

[509] *Id.* at 939.

September 2, 1966, and July 14, 1967, added 1,323 non-whites and no whites.[510]

Indianola failed to preclear the annexations despite Justice Department attempts to compel preclearance. On October 2, 1975, a Justice Department official wrote to Indianola's city attorney advising him that the Justice Department was aware of several annexations by the city and that the annexations could not be implemented until preclearance.[511] The Justice Department official requested the city to either submit the annexations to the Attorney General for reveiw or to seek a declaratory judgment in the District of Columbia district court prior to implementation. In a reply dated November 10, 1975, the city attorney acknowledged the three annexations made during 1966 and 1967 but failed to mention the 1965 annexation.[512]

On December 23, 1975, the Justice Department requested additional information regarding the three annexations of which the Justice Department was aware. The city failed to respond to this request. Some years later, the Justice Department wrote the Indianola city attorney again requesting information regarding the three annexations made in 1966 and 1967.[513] In addition, because the Justice Department had become aware of the 1965 annexation, the correspondence contained a request for information about that annexation. The city provided information to the Justice Department on March 6, 1981.[514]

As a result of Indianola's recalcitrance in responding to Justice Department requests, one of the four areas was " de-annexed" for voting purposes.[515] The Attorney General objected to the 1965 annexation because the 501 whites added to the city at that time diluted black voting strength by 3.8%.[516] The city challenged the Attorney General's failure to object to all four annexations; however, a three-judge court in *Dotson v. City of Indianola*[517] rejected the city's challenge and ordered elections to proceed as scheduled.[518] Under *Dotson*, the only residents eligible to vote were those residing within the November 1, 1964, city

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[510] *Id.*

[511] *Id.*

[512] *Id.*

[513] *Id.*

[514] *Id.* This information was contained in a letter from the Indianola mayor to the Justice Department. *Id.*

[515] Letter from James P. Turner, Acting Assistant Attorney General to Indianola city attorney Dean Belk (June 1, 1981). At the same time, the Attorney General declined to interpose an objection to the three annexations made in 1966 and 1967. *Id.*

[516] *Id.*

[517] 521 F. Supp. 934 (N.D. Miss. 1981).

[518] *Id.* at 944.

limits and, additionally, those in the areas annexed in 1966-1967.[519] As a result of the decision, 1,901 residents who were within Indianola's municipal boundaries for purposes of taxation were unable to vote in a recent municipal election.[520]

By excluding the 1965 unprecleared annexation, the Justice Department's objection left Indianola with a 65.1% non-white population, nine percentage points higher than prior to passage of the Act.[521] The racial make-up of the city council, however, did not change in the election held after the de-annexation of the white residents.[522]

Because the de-annexed areas were white and the precleared areas black, the city challenged the de-annexation before the United States Supreme Court on the basis of reverse discrimination.[523] The Supreme Court affirmed the lower court's judgment.[524]

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[519] *Id.*

[520] *Id.* In an earlier case, the three-judge court noted that only the right to vote and the right to be a candidate were prohibited in the unprecleared annexed areas. Thus, for all other purposes, the residents of the 1965 annexed area were to be considered citizens of Indianola. Dotson v. City of Indianola, 514 F. Supp. 397, 403 (N.D. Miss. 1981) (three-judge court).

[521] 521 F. Supp. at 938-39. The November 1, 1964, racial makeup of Indianola was 56.0% non-white and 44.0% white. In 1980, the city, with all four annexed areas included, was 50.3% white, 49.7% non-white. *Id.*

[522] *Id.* Prior to the December 8, 1981, city election and the removal of the 1901 white residents from the city for voting purposes, only one of Indianola's five aldermen was black. Seven black candidates, one Democrat and six Independents, ran for the five seats along with one white Republican and four white Democratic candidates. The five Democrats were elected, including the incumbent black alderman. The incumbent mayor, also a Democrat, was re-elected in his race with a black Independent.

[523] City of Indianola v. Dotson, No. 81-837 (U.S. filed Nov. 3, 1981). The questions on appeal were (1) whether the Attorney General could preclear only annexations of black areas when to do so would reduce white voting strength from 44.0% to 35.0%, (2) whether white citizens are a protected racial group within section 5 of the Voting Rights Act, (3) whether a municipality can refuse to enforce a change that has been precleared, voting instead to return to the status prior to November 1, 1964. City of Indianola v. Dotson, 50 U.S.L.W. 3521 (U.S. Jan. 5, 1982).

[524] City of Indianola v. Dotson, 50 U.S.L.W. 3943 (U.S. June 1, 1982).

Following this affirmance, the city of Indianola sought to annex nine black subdivisions containing 1391 residents. Because the proposed annexation plan excluded other contiguous areas having 2000 black residents, the plaintiffs objected to the city's proposal on the sole ground that it did not encompass all of the black neighborhoods. The city's proposal would give the city a racial makeup of 42.9% white, 57.1% nonwhite, approximately the same racial percentages that existed on November 1, 1964, the effective date of the Act.

By this action the city hoped to gain preclearance of the 1901 white residents excluded from participation in municipal elections by the June 1, 1981, § 5 objection. The plaintiffs opposed this action for fear that a return to the 1964 racial percentages would

K. Authority of State Courts Under the Act

The latest United States Supreme Court decision involving Mississippi and the '65 Act, *Hathorn v. Lovorn*,[525] concerned the election of school board members in the Louisville Municipal Separate School District in Winston County. The school district encompasses an entire county, making it the only school district of its type in the state. From 1960 to December 1981 three members of the board of trustees for the school district were appointed by the Louisville mayor and city aldermen and the remaining two members were elected by Winston County residents living outside the city limits.[526] In order to have the five school board members elected from supervisor districts in accordance with a 1964 Mississippi statute,[527] five Winston County voters filed suit in the United States District Court for the Northern District of Mississippi in 1975 seeking to enforce the 1964 statute.[528] The federal court stayed the proceedings in order to provide the Mississippi courts an opportunity to interpret the statute.[529] The plaintiffs then filed an action in Winston County Chancery Court.[530] The chancellor held the statute unconstitutional because the statute included the description of the intersection of Highways 14 and 15.[531] The Mississippi Supreme Court, noting that striking the phrase "in which Highways 14 and 15 intersect" would render the statute constitutional, remanded the case and ordered the chancellor to set an election.[532]

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produce a white voting majority in the city even though Indianola would retain a black population majority. Dotson v. City of Indianola, No. GC 80-220-WK-0, slip. op. at 1-3 (N.D. Miss. Nov. 24, 1982).

The district court enjoined the city from utilizing race as a factor in determining which neighborhoods to annex and held that the eligibility for annexation of the excluded black neighborhoods "must be fairly and objectively evaluated by the [city] solely on the basis of nonracial criteria." *Id.* at 10. The court further enjoined the black plaintiffs from "prosecuting or continuing to prosecute objections because of race to the [city's] pending annexation proceedings in the state chancery court." *Id.*

[525] 102 S. Ct. 2421 (1982).

[526] *Id.* at 2424.

[527] MISS. CODE ANN. § 37-7-203(1) (Supp. 1982). This statute mandated that boards of trustees for municipal separate school districts consist of five members, each chosen for a five-year term, with the additional requirement that in "any county in which a municipal separate school district embraces the entire county in which Highways 14 and 15 intersect, one (1) trustee would be elected from each supervisor's district." *Id.*

[528] 102 S. Ct. at 2424 n.3.

[529] *Id.*

[530] *Id.* at 2424.

[531] *Id.* The statute violated MISS. CONST. art. IV, § 90, which bars the enactment of local or private legislation.

[532] Lovorn v. Hathorn, 365 So. 2d 947, 950, 952 (Miss.), *cert. denied*, 441 U.S. 946

Local officials filed a petition for rehearing, claiming that the chancery court could not implement the statute until the change was precleared pursuant to section 5. The Mississippi Supreme Court denied the petition,[533] and subsequently the United States Supreme Court denied certiorari.[534]

The chancellor set an election, outlined the election procedure, required one trustee to be elected from each supervisor's district, and mandated a run-off election between the two candidates receiving the highest number of votes if no candidate received a majority.[535] Furthermore, the chancellor directed school board officials to submit the election plan to the United States Attorney General for section 5 preclearance.[536]

On March 28, 1980, the United States Attorney General objected to the election procedure because of the run-off requirement.[537] The objection letter noted that blacks represented thirty-nine percent of the county's total population, and because of racial polarization and the absence of blacks from local governing boards, the run-off procedure could have a discriminatory effect.[538] The chancellor noted that although state law required a run-off procedure, the election would remain in force subject to compliance with section 5.[539]

The original plaintiffs in the suit, five Winston County voters who after six years still did not have an election pursuant to their original request, appealed again to the Mississippi Supreme Court claiming that the chancellor erred by not obeying the mandates of both the Mississippi Supreme Court and the United States Supreme Court and by not providing for an election as mandated.[540] Referring to its prior decision, "which the United States Supreme Court declined to reverse or alter"[541] as the law of the case, the Mississippi Supreme Court noted that the chancellor erred in making the statute in question[542] subject to

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(1979).

[533] Lovorn v. Hathorn, 365 So. 2d 947 (Miss.), *cert. denied*, 441 U.S. 946 (1979).

[534] Hathorn v. Lovorn, 441 U.S. 946 (1979).

[535] 102 S. Ct. at 2424-25. The mandate for a run-off election was included because MISS. CODE ANN. § 37-7-217 (Supp. 1982) requires a run-off in elections conducted pursuant to the statute in question, MISS. CODE ANN. § 37-7-203(1) (Supp. 1982). 102 S. Ct. at 2425.

[536] 102 S. Ct. at 2425.

[537] *Id.*

[538] *Id.* at 2425 n.6.

[539] *Id.* at 2425.

[540] Carter v. Luke, 399 So. 2d 1356, 1357 (Miss. 1981).

[541] *Id.* at 1358.

[542] *See supra* note 527.

compliance with the "Federal Voters Rights Act."[543] The court held that its prior decision required the chancellor to call an election.[544]

The subsequent appeal to the United States Supreme Court presented the question whether the state supreme court properly ordered the election without ensuring compliance with federal law.[545] Local officials from Louisville and Winston County contended that the Act vested exclusive jurisdiction over proceedings pursuant to the Act in the District of Columbia district court or a local three-judge federal court. According to this interpretation, a state court, when confronted with a change in the state's voting laws, could not determine whether the change was subject to section 5.[546]

The United States Supreme Court reversed the Mississippi Supreme Court, holding that state courts have both the power and the duty to decide whether an election change requires section 5 preclearance, at least when the issue is collateral to another issue properly before the court.[547] The Court noted that the policies of the '65 Act would be furthered by permitting additional tribunals to enforce its commands. Thus, if one party to a state court proceeding alleges that section 5 renders the contemplated relief unenforceable, the state court must examine the claim and refrain from ordering any relief that would violate federal law.[548]

Conclusion

Minority citizens in Mississippi have made considerable strides in voting rights in the past seventeen years, and they now constitute a potent political force in both state and local elections. It is apparent, however, that the state's electoral modifications will continue to be subjected to federal approval for at least another ten years. Therefore, Mississippi's elected officials at both the state and local levels should familiarize themselves thoroughly with the requirements of the Act

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[543] Carter v. Luke, 399 So. 2d 1356, 1358 (Miss. 1981).

[544] *Id.* An election was set for December 5, 1981, and the chancellor as well as the Mississippi Supreme Court and the United States Supreme Court denied motions to stay the election. 102 S. Ct. at 2425 n.8. The United States then sought an injunction in the United States District Court for the Northern District of Mississippi, but the district court refused to issue a temporary restraining order. *Id.*

[545] 102 S. Ct. at 2423.

[546] *Id.* at 2426-27.

[547] *Id.* at 2430.

[548] *Id.* The Court further noted that the United States District Court for the Northern District of Mississippi could decide whether to order special elections or any other interim relief. *Id.* at 2431.

and comply with its mandates meticulously. Fundamentally, this requires that even the most insignificant voting change receive preclearance before its implementation.

In all probability there will continue to be disagreements regarding objections interposed by the Attorney General against Mississippi voting-law changes submitted for preclearance. Nevertheless, the proper resolution of any dispute is through either the District of Columbia district court or a proper request for reconsideration. Implementation of the objectionable practices without preclearance is unacceptable.

Mississippi has pressing demands upon its limited financial resources and to expend those resources by fighting a law that has been upheld as constitutional and which today is sufficiently clear as to its requirements, is a needless waste of time, energy, and money. The time to disagree with the Act and to debate its propriety is either at its passage or its extension, and the proper forum is the Congress, not the courts. Compliance with the requirements of the Act is the only course that will allow this state to enact legislation without journeying to Washington for prior approval and by which Mississippi will disappear from the national spotlight as an example of all that is negative in voting rights controversies.

Kathryn Healy Hester

TRANSACTIONS BETWEEN A CORPORATION AND ITS DIRECTORS: WHERE DOES MISSISSIPPI STAND?

The ancient maxim, "Man cannot serve two masters"[1] has been invoked to identify a variety of relationships in which there exists the potential for conflicts of interest. One such conflict arises when a director[2] engages in a transaction with his corporation.[3] Although these "interested director" transactions[4] may take many forms,[5] this comment will focus on those transactions in which the director, or a corporation in which the director is interested,[6] provides goods or services to the corporation.[7] The purpose of this comment is to trace the development of both the statutory and common law in this area, with special emphasis on Mississippi law. Criticism of the current law and the several proposals for reform will be noted, along with recommendations on the course Mississippi should take in order to clarify the law of interested director transactions. Finally, practical pointers will be offered for the attorney who must advise corporate clients on the advisability of enter-

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[1] *Matthew* 6:24.

[2] A similar conflict also exists with respect to the officers of a corporation. Although this comment will focus upon the duties and liabilities of directors of a corporation, the principles and rules of law apply equally to corporate officers.

[3] This conflict arises as a result of the fiduciary nature of the relationship and its attendant duty of loyalty. *See infra* note 10 and accompanying text.

[4] An interested director is generally defined as one having a personal pecuniary interest in the transaction. *See* Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548, 554-55 (1964). Courts have extended the definition to apply to contracts between a relative of a director and a corporation. *See, e.g.,* Hansen v. Granite Holding Co., 117 Utah 530, 218 P.2d 274, 279 (1950).

[5] The types of situations in which a conflict of interest may arise between a director and the corporation include the director's action in (1) setting salaries of officers who are also directors of the corporation; (2) using corporate funds to defend control of the company; (3) setting dividends when a director is also a shareholder of the corporation; (4) making loans to or receiving loans from the corporation; and (5) engaging in a business similar to or competitive with the corporation. Marsh, *Are Directors Trustees?*, 22 BUS. LAW. 35, 57-73 (1966).

[6] Interested director transactions include an interlocking directorate situation in which one person sits on the board of directors of more than one corporation.

[7] This has been described as one of the most common conflict of interest situations among directors and corporations. *See* NEW YORK STOCK EXCHANGE, THE CORPORATE DIRECTOR AND THE INVESTING PUBLIC 11 (1962), *quoted in* Nolan, *Today's Director*, 20 N.Y.L.F. 313, 337 (1974).

ing into such transactions.

I. Interested Director Transactions at Common Law

At common law, contracts between a corporation and its directors were voidable[8] at the option of the corporation or its shareholders.[9] The basis for this prohibition lay in the fiduciary nature of the relationship between a director and the corporation, which early cases analogized to that between a trustee and the cestui que trust.[10] Under the traditional view, a director could not adequately represent the corporation when his own personal interests were also at stake.[11]

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[8] The corporation's remedies basically included the right to avoid the transaction (avoidance) or to recover unlawful gains from the interested directors individually (accounting), or both. Note, *The Status of the Fairness Test Under Section 713 of the New York Business Corporation Law*, 76 Colum. L. Rev. 1156, 1159-60, 1164 (1976); *see, e.g.*, Wardell v. Railroad Co., 103 U.S. 651, 657-59 (1880) (contract between railroad and newly formed corporation held voidable and accounting remedy proper); Davis v. Rock Creek L.F. & M., 55 Cal. 359, 364 (1880) (president of corporation was member of second firm that lent money to corporation; transaction held voidable as a matter of law); Munson v. Syracuse, Geneva & Corning R.R., 103 N.Y. 58, 73-74, 8 N.E. 355, 358 (1886) (agreement between director of insolvent railroad and railroad corporation to purchase property of railroad held voidable at option of railroad corporation).

[9] *See* 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 977 (rev. perm. ed. 1975). *But see* Burden v. Burden, 159 N.Y. 287, 307, 54 N.E. 17, 23 (1899) (transaction may be attacked by shareholder only upon showing fraud).

[10] *See, e.g.*, Goodin v. Cincinnati & Whitewater Canal Co., 18 Ohio St. 169, 183 (1868). From its inception the trust analogy has presented problems. There are several legal differences between a director and a trustee. For example, directors do not hold legal title to the property entrusted to them, as do trustees. Also, directors act under a general grant of authority to manage the business, while trustees must act within the narrow terms of the trust instrument. Furthermore, a corporation may be bound by a majority of the directors, but trustee action must be unanimous in order to be binding. In addition, the director's practical need for greater flexibility in management of the corporation makes the trustee analogy burdensome. Note, *The Fairness Test of Corporate Contracts with Interested Directors*, 61 Harv. L. Rev. 335, 335-36 (1948).

The debate has continued whether the director stands in the position of a trustee to the corporation. *Compare* Berle, *For Whom Corporate Managers Are Trustees*, 45 Harv. L. Rev. 1365, 1365 (1932) (advocating position that directors' role is to act as trustees for benefit of corporation and its stockholders) *with* Dodd, *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1148 (1932) (directors have duties to the public as well as to the corporation).

[11] Justice Field stated in 1880:

> It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another whose interests are conflicting . . . . The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, constituted as humanity is, in the majority of cases duty would be

By 1910 this rule of automatic voidability had given way to a more flexible approach.[12] Transactions between a director and the corporation were generally sanctioned by the courts if two criteria were met: (1) the corporation had disinterested and independent representation,[13] and (2) the transaction was fair to the corporation.[14] The absence of either of the criteria would render the transaction voidable at the option of the corporation or its shareholders.[15] Although a technical trustee analogy argument was advanced to justify the change in position from the earlier automatic voidability rule,[16] the real justification appears to have been a recognition of the realities of the modern business environment.[17]

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overborne in the struggle.
Wardell v. Railroad Co., 103 U.S. 651, 658 (1880).

[12] Marsh, *supra* note 5, at 39-40.

[13] This element is generally held to be satisfied if a disinterested board of directors, with knowledge of the adverse interest, approves the transaction. *See* 3 W. FLETCHER, *supra* note 9, at 408-21.

Earlier cases had uniformly held that approval of the contract by a disinterested majority of the board of directors did not save the contract from voidability. *See* Marsh, *supra* note 5, at 37. Two reasons were advanced for this view. First, the corporation was entitled to the undivided loyalty and representation of all its directors. *See* Stewart v. Lehigh Valley R.R., 38 N.J.L. 505, 523 (1875). Second, it was feared that the interested director might exert undue influence over his colleagues, rendering the corporation inadequately protected. *See* Munson v. Syracuse, Geneva & Corning R.R., 103 N.Y. 58, 74, 8 N.E. 355, 358 (1886).

Under the view of disinterested board approval, not only is the vote of the interested director not counted in determining majority approval, but also his presence is not considered in determining whether a quorum exists. *See, e.g.*, Enright v. Hecksher, 240 F. 863, 872 (2d Cir. 1917); Ingalls Iron Works Co. v. Ingalls Found., 266 Ala. 656, 665, 98 So. 2d 30, 38 (1957). For a discussion of the disinterested quorum rule under statutory law, see *infra* note 33 and accompanying text.

[14] For a discussion of the fairness test, see *infra* notes 70-77 and accompanying text.

[15] *See, e.g.*, Geominerals Corp. v. Grace, 232 Ark. 524, 534, 338 S.W.2d 935, 940 (1960) (contract found to be unfair to corporation was voidable, even though approved by disinterested directors); Texas Auto Co. v. Arbetter, 1 S.W.2d 334, 337 (Tex. Civ. App. 1927) (contract voidable due to interested director's participation in vote for approval).

[16] Under this rationale, a trustee was allowed to deal directly with the cestui que trust if he made full disclosure and if the transaction was fair and reasonable. Marsh, *supra* note 5, at 40. By fully disclosing his interest in the transaction, by taking no advantage of his position, and by obtaining approval from a disinterested majority of the directors, the interested director was likewise held to be able to deal with his corporation. Tenison v. Patton, 95 Tex. 284, 292-93, 67 S.W. 92, 95 (1902).

[17] "Despite a trend toward more independent boards . . . data reveals that 29.4 percent of all directors . . . have significant economic or personal relationships with the . . . management which potentially could interfere with the exercise of independent judgement." SECURITIES AND EXCHANGE COMMISSION, STAFF REPORT ON CORPORATE ACCOUNTA-

Many state courts have subsequently eliminated the disinterested representation requirement[18] and will now uphold a transaction solely upon a showing of fairness to the corporation.[19] The burden of proving a transaction's fairness under this common law view[20] is placed upon the interested director.[21] The burden of proof may be shifted by a provision in the corporate bylaws permitting transactions with directors[22] or by shareholder approval of the transaction[23] to the party attacking

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BILITY (1980), *reprinted in* [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,674. *See generally* Kaplan, *Conflict of Interests: Corporate Directors*, 50 ILL. B.J. 1072, 1072-73 (1962) (describing situations in which board members with potential conflicts of interest also create advantage for corporation due to their wide business interests and contacts).

[18] *See, e.g.*, Tovrea Land & Cattle Co. v. Linsenmeyer, 100 Ariz. 107, 412 P.2d 47, 58 (1966); Shlensky v. South Parkway Bldg. Corp., 19 Ill. 2d 268, 280-81, 166 N.E.2d 793, 800 (1960); Abeles v. Adams Eng'g Co., 35 N.J. 411, 173 A.2d 246, 255 (1961) (contract enforceable upon showing of fairness alone).

[19] One commentator has stated that by 1960 this was the majority view. Marsh, *supra* note 5, at 43. Another authority, while recognizing this liberal trend, has stated that the majority of jurisdictions continue to hold the contract voidable when the interested party represents both himself and the corporation, even though the transaction may be fair to the corporation. 3 W. FLETCHER, *supra* note 9, § 924 (rev. perm. ed. 1975 & Supp. 1980).

[20] See *infra* notes 65-69 and accompanying text for a discussion of the burden of proof under statutory enactments.

[21] The leading case promulgating this principle is Pepper v. Litton, 308 U.S. 295 (1939). The Supreme Court held that when a director's transaction with the corporation is challenged the burden is on the interested director to show its "inherent fairness" from the viewpoint of the corporation. *Id.* at 306.

[22] *See, e.g.*, Picard v. Sperry Corp., 48 F. Supp. 465, 469 (S.D.N.Y. 1943) (shareholders have burden of proving invalidity of provision allowing transactions between corporation and director), *aff'd*, 152 F.2d 462 (2d Cir. 1946); Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 417, 8 N.E.2d 895, 907 (1937) (bylaws, though not granting immunity to directors, exonerates them from adverse inferences that would otherwise be raised by relationship). *But see* Pappas v. Moss, 393 F.2d 865, 867 (3d Cir. 1968) (provision in bylaws allowing sale of stock to directors does not shift burden of proof to party attacking transaction); Whalen v. Hudson Hotel Co., 183 A.D. 316, 328-31, 170 N.Y.S. 855, 864-66 (1918) (Woodward, J., concurring) (stating that clause in bylaws, by laying foundation for future fraudulent transactions, should increase burden of proof upon directors to show fairness).

[23] Delaware courts have held that shareholder approval both shifts the burden of proof to the party attacking the transaction and raises the standard of proof required from a showing of unfairness to a showing of waste. In the absence of such a showing, the court will not interfere with the business judgment of the shareholders. *See, e.g.*, Gottlieb v. Heyden Chem. Corp., 33 Del. Ch. 177, 91 A.2d 57, 58 (Sup. Ct. 1952); Schreiber v. Pennzoil Co., 419 A.2d 952, 957 (Del. Ch. 1980). This standard has not been applied in cases arising under the Delaware statute dealing with interested director transactions. *See infra* notes 52-60 and accompanying text.

In addition, shareholder approval may have the effect of ratifying the transaction,

the transaction.[24]

II. Statutory Modifications of the Common Law Rules

Thirty-five states have enacted statutory provisions dealing with transactions between a director and his corporation.[25] The majority of these statutes are identical[26] or similar[27] to section 41 of the Model Business Corporation Act[28] (Model Act), which was patterned after an earlier version of section 310[29] of the California Corporations Code.[30]

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thereby precluding an inquiry into whether the transaction was fair. *See* Film Enterprises, Inc. v. Selected Pictures, Inc., 138 Colo. 468, 335 P.2d 260, 264-65 (1959) (ratification makes fairness inquiry unnecessary). Many courts, however, follow the rule of ratification only upon unanimous approval by the shareholders after full disclosure of the adverse interest. *See, e.g.*, Robbins v. Banner Indus., Inc., 285 F. Supp. 758, 763 (S.D.N.Y. 1966); Hill Dredging Corp. v. Risley, 18 N.J. 501, 114 A.2d 697, 713 (1955) (ratification defense may be lost if even one shareholder did not join in the ratification).

[24] *See, e.g.*, Eliasberg v. Standard Oil Co., 23 N.J. Super. 431, 440, 92 A.2d 862, 866-67 (1952) (burden of proof depends upon whether shareholder approval obtained), *aff'd*, 12 N.J. 467, 97 A.2d 437 (1953).

[25] *See* Ala. Code § 10-2A-63 (1980); Ariz. Rev. Stat. Ann. § 10-041 (1977); Cal. Corp. Code § 310 (West 1977); Colo. Rev. Stat. § 7-5-114.5 (Supp. 1981); Conn. Gen. Stat. Ann. § 33-323 (West Supp. 1982); Del. Code Ann. tit. 8, § 144 (1975); Fla. Stat. Ann. § 607.124 (West 1977); Ga. Code Ann. § 14-2-155 (1982); Idaho Code § 30-1-41 (1980); Ind. Code Ann. § 23-1-10-6 (Burns 1972); Kan. Stat. Ann. § 17-6304 (1974); Ky. Rev. Stat. Ann. § 271A.205 (Baldwin 1973); La. Rev. Stat. Ann. § 12:84 (West 1969); Me. Rev. Stat. Ann. tit. 13-A, § 717 (1981); Md. Corps. & Ass'ns Code Ann. § 2-419 (Supp. 1981); Mich. Comp. Laws Ann. § 450.1545 (1973); Minn. Stat. Ann. § 302A.255 (West Supp. 1981); Neb. Rev. Stat. § 21-2040.01 (1977); Nev. Rev. Stat. § 78.140 (1981); N.H. Rev. Stat. Ann. § 293-A:41 (Supp. 1981); N.J. Stat. Ann. § 14A:6-8 (West Supp. 1982-1983); N.Y. Bus. Corp. Law § 713 (McKinney Supp. 1981-1982); N.C. Gen. Stat. § 55-30 (1975); Ohio Rev. Code Ann. § 1701.60 (Page 1978); Okla. Stat. Ann. tit. 18, § 1.175a (West Supp. 1981-1982); Or. Rev. Stat. § 57.265 (1979); Pa. Stat. Ann. tit. 15, § 1409.1 (Purdon Supp. 1982-1983); R.I. Gen. Laws § 7-1.1-37.1 (1970); S.C. Code Ann. § 33-13-160 (Law Co-op. Supp. 1981); Tenn. Code Ann. § 48-816 (1979); Vt. Stat. Ann. tit. 11, § 1888 (1973); Va. Code §§ 13.1-39.1 (1978); W. Va. Code § 31-1-25 (1982); Wis. Stat. Ann. § 180.355 (West Supp. 1981-1982); Wyo. Stat. § 17-1-136.1 (Supp. 1982).

[26] *See* Neb. Rev. Stat. § 21-2040.01 (1977); N.H. Rev. Stat. Ann. § 293-A:41 (Supp. 1981); Or. Rev. Stat. § 57.265 (1979).

[27] *See, e.g.*, Del. Code Ann. tit. 8, § 144 (1975) (provisions also apply to officers of corporation); N.Y. Bus. Corp. Law § 713 (McKinney Supp. 1981-1982) (transaction not voidable "by reason alone" of director's interest); Ohio Rev. Code Ann. § 1701.60 (Page 1978) (requiring disclosure of all material facts pertaining to transaction); Vt. Stat. Ann. tit. 11, § 1888 (1973) (interested director may not be present during board action on matter).

[28] Model Business Corp. Act Ann. 2d § 41 (1971). See *infra* note 31 for the full text of the section.

[29] Cal. Corp. Code § 310 (West 1977) (original version at Cal. Gen. Corp. Laws § 820 (West 1955)). See *infra* note 45 for the full text of former § 820. The present statute

Section 41 of the Model Act[31] provides that contracts or transactions between a corporation and its directors[32] are not voidable by virtue of the relationship, provided (1) that after disclosure of the director's interest, the board of directors approves the transaction by a

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separates those transactions in which the director contracts directly with his corporation from those transactions between corporations having one or more common directors. In the first situation, the transaction is validated (1) if it is approved by the shareholders, with the shares of the interested director not counted toward approval of the transaction; or (2) if it is approved by a disinterested board of directors *and* is fair to the corporation; or (3) if it is proved by the interested director to be fair. CAL. CORP. CODE § 310 (West 1977).

A transaction between two corporations having one or more common directors and in which the common director does not have a material financial interest is valid (1) if it is approved by a vote of the shareholders; or (2) if it is approved by a vote of the board of directors without counting the vote of the common director; or (3) if it is fair and reasonable to the corporation. *Id.*

In both situations, the interested or common director may be counted in determining the presence of a quorum. *Id.*

[30] The only basic difference between former § 820 of the California Code and section 41 of the Model Act appears to be the requirement of good faith imposed upon the interested director by § 820.

[31] The full text of section 41 reads as follows:

> No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association or entity in which one or more of its directors are directors or officers or are financially interested, shall be either void or voidable because of such relationship or interest or because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction or because his or their votes are counted for such purpose, if:
>
> (a) the fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors; or
>
> (b) the fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify such contract or transaction by vote or written consent; or
>
> (c) the contract or transaction is fair and reasonable to the corporation.
>
> Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction.

MODEL BUSINESS CORP. ACT ANN. 2d § 41 (1971).

[32] This section also applies to interlocking directorate situations in which the transaction is between two corporations with one or more common directors. *Id.* § 41 comment.

sufficient vote, without counting the vote of the interested director;[33] or (2) that after disclosure, the transaction is approved by a vote of the shareholders;[34] or (3) that the contract is fair and reasonable to the corporation.[35] The use of the disjunctive "or" suggests that the occurrence of any of the three conditions would satisfy the statute,[36] and thus validate the transaction. This literal interpretation has been the subject of much debate among commentators[37] and courts,[38] and the debate appears to be far from settled.[39]

The official comment[40] to section 41 is of little help in resolving the controversy. Although the comment contains language indicating an intent to create a validation procedure,[41] it also states that the pur-

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[33] Section 41 provides that the interested director may be counted toward determining the presence of a quorum. *Id.* § 41. This provision constitutes a clear departure from the common law rule. *See supra* note 13. Some states that have enacted statutes similar to section 41 continue to adhere to the common law disinterested quorum rule. *See, e.g.*, ALA. CODE § 10-2A-63 (1980); MINN. STAT. ANN. § 302A.255 (West Supp. 1981).

[34] There is no requirement that the shareholders be disinterested in the transaction. Thus, an interested director who is also a shareholder should be free to vote his share in order to ratify the transaction. *But cf.* Fliegler v. Lawrence, 361 A.2d 218, 221 (Del. 1976) (continuing to apply common law rule that interested directors' votes could not be counted in determining shareholder ratification).

Statutes in some states provide that the interested director may not vote in a shareholder ratification of the transaction. *See, e.g.*, CAL. CORP. CODE § 310 (West 1977); MINN. STAT. ANN. § 302A.255 (West Supp. 1981).

[35] *See infra* notes 70-77 and accompanying text for a discussion of the fairness test.

[36] When the term "or" is used, it is presumed to be used in the disjunctive sense, unless contrary legislative intent is clearly expressed. 1A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 21.14 n.1 (4th ed. 1972).

[37] *Compare* Note, *The Fairness Test of Corporate Contracts with Interested Directors*, 61 HARV. L. REV. 335, 339 (1948) (compliance with statutory procedure of approval immunizes contract from being subjected to test of fairness) *with* Comment, *"Interested Director's" Contracts—Section 713 of the New York Business Corporation Law and the "Fairness" Test*, 41 FORDHAM L. REV. 639, 648 (1973) (disclosure plus ratification not sufficient to validate unfair contract).

[38] *Compare* Tennessee Dressed Beef Co. v. Hall, 519 S.W.2d 805, 808 (Tenn. Ct. App. 1974) (transaction valid if in compliance with any one of three statutory provisions) *with* Scott v. Multi-Amp Corp., 386 F. Supp. 44, 67 (D.N.J. 1974) (all three statutory subsections must be fulfilled in order to validate contract).

[39] For an excellent analysis of this issue, see Bulbulia & Pinto, *Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards?*, 53 NOTRE DAME LAW. 201 (1977).

[40] MODEL BUSINESS CORP. ACT ANN. 2d. § 41 comment (1971).

[41] The comment states:

> [The] purpose is to establish statutory guidelines for determining the validity of transactions between a corporation and one or more of its directors, or between corporations having common directors, or between a corporation and another entity in which a director of the corporation is financially interested. It

pose of the section is not to validate, but merely to save transactions from automatic voidability.[42]

The first judicial attempt to resolve this uncertainty came in *Remillard Brick Co. v. Remillard-Dandini Co.*,[43] which was decided under the predecessor to section 310 of the California Corporations Code.[44] In *Remillard* two directors of a brick manufacturing company

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validates, if the prescribed tests are satisfied, transactions with interested directors which common law rules often make voidable, if not void.

Id. (emphasis added).

[42] In a subsequent paragraph, the comment discusses the purpose of the section:

> [S]ection 41 [provides] that contracts or transactions involving an interested director will not be void or voidable solely because of the director's interest if certain conditions are met. In all other respects equitable principles will continue to be applicable. The *function of section 41 is not to provide a basis for validating* for all purposes a contract or transaction between an interested director and his corporation, but simply to establish that such contract or transaction is not automatically void or voidable solely by reason of the director's interest.

Id. (emphasis added).

[43] 109 Cal. App. 2d 405, 241 P.2d 66 (1952).

[44] The predecessor section to § 310 stated:

> Directors and officers shall exercise their powers in good faith, and with a view to the interests of the corporation. No contract or other transaction between a corporation and one or more if its directors, or between a corporation and any corporation, firm, or association in which one or more of its directors are directors or are financially interested, is either void or voidable because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes or approves the contract or transaction, or because his or their votes are counted for such purpose, if the circumstances specified in any of the following subdivisions exist:
>
> (a) The fact of the common directorship or financial interest is disclosed or known to the board or directors or committee and noted in the minutes, and the board or committee authorizes, approves, or ratifies the contract or transaction in good faith by a vote sufficient for the purpose without counting the vote or votes of such director or directors.
>
> (b) The fact of the common directorship or financial interest is disclosed or known to the shareholders, and they approve or ratify the contract or transaction in good faith by a majority vote or written consent of shareholders entitled to vote.
>
> (c) The contract or transaction is just and reasonable as to the corporation at the time it is authorized or approved.
>
> Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves, or ratifies a contract or transaction.

CAL. GEN. CORP. LAW §820 (West 1955), (current version at CAL. CORP. CODE §310 (West 1977)).

set up a separate corporation, which they wholly owned, to handle sales of the manufactured bricks.[45] Although the contract that transferred the sales function from the manufacturing corporation to the sales corporation[46] was approved by the manufacturing corporation's board of directors, this action did not satisfy the statutory requirements because the votes of the two interested directors were necessary for approval.[47] The defendant directors, however, were able to obtain shareholder approval of the contract by virtue of their control over the majority shareholders of the manufacturing corporation.[48]

In response to a derivative suit brought by the minority shareholder of the manufacturing corporation, the defendant directors contended that, because of the shareholder ratification of the transaction after the disclosure of their interest, the statutory requirements of the section were fulfilled and the contract was thus validated.[49] The California Supreme Court rejected this contention, holding that compliance with the statutory provisions did not preclude a judicial inquiry into the fairness of the transaction.[50] Finding that the defendant directors acted in their own interests, to the detriment of the minority shareholder, the court ordered all profits made by the sales corporation to be returned to the manufacturing corporation.[51]

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[45] 109 Cal. App. 2d at 411, 241 P.2d at 69.

[46] Prior to this transaction, the manufacturing corporation, like other firms in the industry, handled both sales and manufacturing functions. *Id.* at 415, 241 P.2d at 72. The idea of forming a separate corporation to handle sales apparently stemmed from the interested directors' unsuccessful attempt to buy out the interest of the minority shareholder in the company. *Id.* at 410, 241 P.2d at 69.

[47] *Id.* at 411, 241 P.2d at 69.

[48] Although the majority of shares of the corporation were owned by another party, the interested directors had entered into an agreement to purchase those shares and held a proxy agreement enabling them to vote the shares. Therefore, for all practical purposes, the interested directors had complete control of the majority shareholders. *Id.* at 411, 241 P.2d at 69-70.

[49] *Id.* at 417, 241 P.2d at 73.

[50] The court stated:

> [N]either section 820 of the Corporations Code nor any other provision of the law automatically validates such transactions simply because there has been a disclosure and approval by the majority of the stockholders . . . . Even though the requirements of section 820 are technically met, transactions that are unfair and unreasonable to the corporation may be avoided . . . . It would be a shocking concept of corporate morality to hold that because the majority directors or stockholders disclose their purpose and interest, they may strip a corporation of its assets to their own financial advantage, and that the minority is without legal redress.

Id. at 418-19, 241 P.2d at 74.

[51] *Id.* at 423, 241 P.2d at 76-77. The court was not persuaded by the directors' argu-

Although one authority on Delaware corporate law has maintained otherwise,[52] Delaware appears to follow the *Remillard* approach of requiring fairness despite ratification by the shareholders or by the disinterested directors.[53] In *Fliegler v. Lawrence*,[54] the Delaware Supreme Court dealt with a transaction in which Aqua Mines executed an option agreement to purchase a second corporation that had been formed and was controlled by a number of Aqua's directors and shareholders.[55] The transaction was approved by a majority vote of Aqua's shareholders.[56] In a shareholder's derivative action,[57] the Delaware court rejected the defendant directors' argument that shareholder ratification relieved them of the burden of proving the fairness of the transaction.[58]

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ment that the manufacturing corporation made a profit on the transaction. The court reasoned that the efforts of the directors should have been utilized on behalf of the manufacturing corporation; therefore, the profits made as a result of their efforts rightfully belonged to the corporation. *Id.* at 419, 241 P.2d at 74. The court did allow, however, the defendants to receive reasonable compensation for their services. *Id.* at 423, 241 P.2d at 76.

[52] *See* E. FOLK, THE DELAWARE GENERAL CORPORATION LAW 75 (1972) (purpose and effect of Delaware statute is to validate contract if any one of three statutory tests is met).

[53] This view is surprising in light of Delaware's traditional reputation of being pro-management. *See generally* Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 668-96 (1974).

[54] 361 A.2d 218 (Del. 1976).

[55] *Id.* at 220.

[56] *Id.*

[57] Plaintiff shareholders attacked the adequacy of consideration, contending that Aqua was issuing shares having a fair market value of $1,200,000 in return for shares of a corporation in which only $83,000 in cash had been invested and whose property was subject to loans of $300,000. *Id.* at 223.

[58] *Id.* at 221-22. The defendants relied on their compliance with DEL. CODE ANN. tit. 8, § 144 (1975), which provides:

> (a) *No contract or transaction* between a corporation and 1 or more of its directors or officers, or *between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason,* or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, *if:*
>
> (1) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or
>
> (2) *The material facts as to his relationship or interest and as to*

The court held that judicial inquiry into the fairness of the transaction was not precluded simply by compliance with the statute.[59] Subsequent Delaware cases have continued to impose the test of fairness to interested director transactions, but without expressly indicating whether shareholder or disinterested director approval was obtained.[60]

The approach of requiring fairness despite ratification has been criticized on the grounds that it is contrary to principles of statutory construction[61] and that it renders the provisions for ratification meaningless.[62] But, if ratification by the shareholders or disinterested directors alone is deemed sufficient to validate the transaction, the effect would be to substitute disclosure for fairness.[63] One view has been advanced that the statutory provisions are intended merely to provide procedural fairness, with substantive fairness continuing to be a question properly determined by the courts.[64]

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the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee, or the shareholders.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction.

Id. § 144 (emphasis added). The only notable differences between § 144 and § 41 of the Model Act, *see supra* note 31, is that the former requires disclosure of all material facts pertaining to the director's interest and provides that a transaction is not voidable "solely" by reason of the interest if there is compliance with any of the three provisions.

[59] 361 A.2d at 222. Arguably, the decision was based on the fact that shareholder ratification was obtained by a vote of the interested shareholders. *Id.* at 221. The language of the opinion, however, indicates a much broader holding. The court stated:

We do not read the statute as providing the broad immunity for which defendants contend. It merely removes an "interested director" cloud when its terms are met and provides against invalidation of an agreement "solely" because such a director or officer is involved. Nothing in the statute sanctions unfairness to Aqua or removes the transaction from judicial scrutiny.

Id. at 222.

[60] *See, e.g.*, Fins v. Pearlman, 424 A.2d 305, 307-08 (Del. 1980); Neponsit Inv. Co. v. Abramson, 405 A.2d 97, 99-100 (Del. 1979).

[61] *See supra* note 36.

[62] *See* Marsh, *supra* note 5, at 47 (entire statute could just as well have been compressed into the final clause, which deals with fairness).

[63] Bulbulia & Pinto, *supra* note 39, at 207. The elimination of fairness as a criterion would be a significant departure from the common law, in which both ratification and fairness were required. *See supra* notes 14-24 and accompanying text.

[64] *See* Bulbulia & Pinto, *supra* note 39, at 209-10. Under this rationale the effect of the fairness clause in the statutory provision is simply to act as a "savings clause" in the

Another commentator has stated that the effect of shareholder or disinterested director approval is simply to shift the burden of proof from the interested director[65] to the party seeking to avoid the transaction.[66] Although this interpretation has been adopted by some courts,[67] other jurisdictions continue to place the burden of proof on the interested director, notwithstanding approval.[68] Yet another interpretation is that approval does not shift the burden of proof from the interested director, but merely lowers the standard of proof necessary for a showing of fairness.[69]

If fairness is required in spite of ratification or statutory compliance, the most pervasive test used by the courts in determining the fairness of a transaction between a corporation and its directors[70] is whether the transaction "carries the earmarks of an arm's length bargain."[71] Other tests also have been enunciated by the courts as relevant in establishing fairness.[72] One jurisdiction requires a showing of an ad-

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event that the directors failed to obtain shareholder or board approval. Thus, compliance with any of the three alternative provisions saves the transaction from automatic voidability; however, the transaction is not automatically validated by compliance with the procedural provisions, because the question of substantive fairness remains open for judicial inquiry. *Id.*

[65] Clearly the burden of proof rests upon the interested director in the event there has been no board or shareholder approval. *See, e.g.*, Harris Trust & Sav. Bank v. Joanna-Western Mills, 53 Ill. App. 3d 542, 548, 368 N.E.2d 629, 634 (1977) (applying Delaware law). This view is in accord with the common law rule. *See supra* notes 20-24 and accompanying text.

[66] Israels, *The Corporate Triangle—Some Comparative Aspects of the New Jersey, New York, and Delaware Statutes*, 23 RUTGERS L. REV. 615, 628 (1969).

[67] *See, e.g.*, Cohen v. Ayers, 596 F.2d 733, 740 (7th Cir. 1979) (concluding that New York law follows general rule in shifting burden of proof upon ratification).

[68] *See* Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 525 (Iowa 1974).

[69] *See* Scott v. Multi-Amp Corp., 386 F. Supp. 44, 68 (D.N.J. 1974) (standard of proof reduced from "clear and convincing" to "preponderance of the evidence" upon compliance with approval provisions of statute).

[70] For a discussion of the fairness test in the context of specific transactions, see Note, *supra* note 37, at 337-39.

[71] Pepper v. Litton, 308 U.S. 295, 306-07 (1939) (footnote omitted). The "arm's length" test is premised upon the concept of negotiations between two independent parties of approximate bargaining equality. Comment, *Corporate Fiduciary Doctrine in the Context of Parent-Subsidiary Relations*, 74 YALE L.J. 338, 340 (1964). Accordingly, an important element in determining whether the arm's length requirement is met is the extent of the interested director's involvement in the bargaining process. *See, e.g.*, Thomas v. Satfield Co., 363 Mich. 111, 108 N.W.2d 907, 911 (1961) (in order to meet arm's length requirement, interested director must divorce himself from corporate action on transaction, leaving disinterested directors in complete control).

[72] *See generally* Note, *Section 21-2040.01: Interested Director Transactions and Considerations of Fairness*, 58 NEB. L. REV. 909, 911 (1979).

equate consideration and a proper business purpose for the transaction.[73] Another test used by Delaware courts is whether a wholly independent board of directors would have approved the transaction.[74] Other courts have taken the position that disclosure is an element in determining fairness.[75] Regardless of the test used to determine fairness, it is clear that the issue of fairness remains a question of fact,[76] and is incapable of precise definition.[77]

III. Interested Director Transactions in Mississippi

Mississippi did not enact section 41 of the Model Business Corporation Act;[78] therefore, the law applicable to interested director transactions must be derived primarily from case law.[79] The Mississippi Supreme Court's pronouncement in *Knox Glass Bottle Co. v. Underwood*[80] is the leading decision in this area.[81] Although the *Knox*

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[73] Fill Bldgs., Inc. v. Alexander Hamilton Life, 396 Mich. 453, 241 N.W.2d 466, 469 (1976). The Michigan court agreed with defense counsel's argument that the sale of "widgets" by an insider to a corporation would not be fair, even though the price were fair, if there were no corporate purpose for the acquisition of the "widgets." *Id.* at 461 n.7, 241 N.W.2d at 469 n.7.

[74] *See, e.g.*, Johnston v. Greene, 35 Del. Ch. 479, 490, 121 A.2d 919, 925 (1956); Harris Trust & Sav. Bank v. Joanna-Western Mills Co., 53 Ill. App. 3d 542, 555, 368 N.E.2d 629, 639 (1977) (applying Delaware law).

[75] *See, e.g.*, Voss Oil Co. v. Voss, 367 P.2d 977, 979 (Wyo. 1962) (one test of fairness depends upon whether there has been full disclosure); *cf.* State *ex rel.* Hayes Oyster Co. v. Keypoint Oyster Co., 64 Wash. 2d 375, 382, 391 P.2d 979, 984 (1964) (nondisclosure by an interested director was in itself unfair).

[76] *See, e.g.*, Austrian v. Williams, 103 F. Supp. 64, 76 (S.D.N.Y. 1952); Harris Trust & Sav. Bank v. Joanna-Western Mills Co., 53 Ill. App. 3d 542, 555, 368 N.E.2d 629, 639 (1977) (applying Delaware law).

[77] *See* Comment, *The Voidability of Interested Director Contracts Under the Kansas Corporation Code*, 24 U. Kan. L. Rev. 655, 671 (1976).

[78] In 1962, Mississippi enacted the Mississippi Business Corporation Act, ch. 235, 1962 Miss. Laws 352 (codified at Miss. Code Ann. §§ 79-3-1 to -293 (1972 & Supp. 1981)). Although the Act was patterned after the Model Act, there are several significant differences between the Mississippi enactment and the Model Act. *See* Hodge & Perry, *The Model Business Corporation Act: Does the Mississippi Version Lime the Bushes?*, 46 Miss. L.J. 371, 375-99 (1975).

[79] There are two Mississippi statutes relevant to interested director transactions. Miss. Code Ann. § 79-3-89 (1972) prohibits loans by the corporation to officers or directors, and *id.* § 79-3-67 (Supp. 1981) provides that no person engaged in a competing business, either individually or as a stockholder, shall serve on a corporation's board of directors without approval by a majority of the stockholders.

[80] 228 Miss. 699, 89 So. 2d 799 (1956), *suggestion of error overruled per curiam* 228 Miss. 699, 91 So. 2d 843, *cert. denied*, 353 U.S. 977 (1957).

[81] Prior to *Knox Glass*, few Mississippi cases had dealt with the subject. Greenwood

Glass decision leaves many questions unanswered regarding the status of interested directors' contracts in Mississippi, it remains the primary authority by which such transactions are judged.

The complicated factual situation in *Knox Glass* involved the operation of two corporations that were engaged in the manufacture and sale of glass bottles. Knox Glass Bottle Company was a Mississippi corporation whose capital stock, except for five shares,[82] was owned by Knox Glass Bottle Company of Pennsylvania. Roy Underwood was director and president of Knox Glass of Mississippi until his death in 1951.[83] He also held a general proxy from Knox Glass of Pennsylvania that allowed him to vote the company's stock in Knox Glass of Mississippi at any shareholder's meeting.[84]

C.R. Underwood, the brother of Roy Underwood, served as an officer and director of Knox Glass of Mississippi. Upon Roy's death, C. R. Underwood became president of both Knox Glass of Mississippi and Knox Glass of Pennsylvania and was given a power of attorney by Knox Glass of Pennsylvania to vote the stock owned by that company in Knox Glass of Mississippi.[85] Also serving as officers and directors of Knox Glass of Mississippi during the time period involved in the subsequent litigation were E.F. Underwood and J.H. Underwood, sons of C.R. Underwood.[86] Although C. Alberta Luter, the secretary and close

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Ice & Coal Co. v. Georgia Home Ins. Co., 72 Miss. 46, 17 So. 83 (1895), concerned an insurance policy issued by an agent to a corporation in which he was an officer, director, and stockholder. In an action to recover the proceeds of the policy, the court held the policy void by virtue of the "antagonistic" relationship that the director held. *Id.* at 50, 17 So. at 84.

Following *Greenwood Ice*, in Millsaps v. Chapman, 76 Miss. 942, 26 So. 369 (1899), the court ordered a director to account for the difference between the price paid for land purchased from the corporation and its actual value. *Id.* at 954, 26 So. at 370.

Landstreet v. Meyer, 201 Miss. 826, 29 So. 2d 653 (1947), involved a director's participation in a board and shareholder resolution to fix his salary as president. The court held the transaction voidable on a showing by minority shareholders that the salary fixed was clearly wasteful and excessive with regard to the minority. *Id.* at 833, 29 So. 2d at 655. In *Landstreet*, the court indicated that shareholder ratification, because it was accomplished by the vote of the interested director's shares, did not ratify the transaction. *Id.*, 29 So. 2d at 655.

[82] These five shares were held by the directors of Knox Glass of Mississippi as qualifying shares. 228 Miss. at 719-20, 89 So. 2d at 803.

[83] *Id.* at 720, 89 So. 2d at 803. Roy Underwood also served as president of Knox Glass of Pennsylvania from 1934 until 1951 and owned approximately one-third of the outstanding shares of stock in Knox Glass of Pennsylvania. *Id.*, 89 So. 2d at 803.

[84] *Id.*, 89 So. 2d at 803.

[85] *Id.*, 89 So. 2d at 803-04.

[86] *Id.* at 721, 89 So. 2d at 804.

personal friend of C.R. Underwood, served at one time as an officer and director of Knox Glass of Mississippi, she did not serve in those capacities during the entire time period involved in the litigation.[87]

The litigation concerned the validity of certain truck leases made to Knox Glass of Mississippi. Rather than using company-owned trucks for the purpose of delivering manufactured goods to customers, Roy Underwood made the decision to lease the trucks.[88] The leasing agreement[89] proved to be very profitable for the lessors;[90] the lessors could expect to repay the purchase price of a truck within five to ten months, with all succeeding rentals constituting a clear profit.[91] From 1948 until 1953, seventeen of the nineteen trucks that were leased by Knox Glass of Mississippi were leased to the corporation by the Underwood family and Miss Luter.[92] Net revenues paid by Knox Glass of Mississippi to the Underwoods and Miss Luter exceeded one million dollars over a period of five years.[93]

In a 1953 proxy battle, the Underwoods were ousted from control of both Knox Glass of Mississippi and Knox Glass of Pennsylvania.[94] The new management subsequently brought an action challenging the validity of the truck leases entered into between the Underwood family, Miss Luter, and the corporation.[95] The complaint alleged that the

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[87] *Id.* at 721-22, 89 So. 2d at 804. Miss Luter served as an officer and director from 1941 until January 23, 1951. *Id.* at 722, 89 So. 2d at 804. The litigation involved the time period 1948 through October 31, 1953. *Id.* at 730, 89 So. 2d at 808.

[88] *Id.* at 726-28, 89 So. 2d at 806-07.

[89] Under the lease agreement, Knox Glass of Mississippi paid to the lessor an amount equal to the published carload freight rate, after deducting drivers' wages, insurance premiums, gasoline and oil, repairs and maintenance, tires, and other expenses in connection with the use and operation of the vehicle. The lease was on a month-to-month basis, with either party having a right to terminate upon 30 days written notice. *Id.* at 727, 89 So. 2d at 807.

[90] The leases were profitable for several reasons. The regularity of the need for transportation in a predictable quantity allowed the management to utilize the most economical number of trucks, ensuring continuous and regular usage. The location of customer outlets and sources for needed raw materials enabled efficient routing of the trucks. The lessee, Knox Glass of Mississippi, furnished all operating and maintenance services and also arranged for "back-hauls" of various commodities, turning over all revenues generated by the "back-hauls" to the lessors. *Id.* at 732-33, 89 So. 2d at 809.

[91] *Id.* at 730, 89 So. 2d at 808.

[92] Leases made by the Underwood family included those made by C.R. Underwood, his wife, Florence Underwood, his sons, E.F. Underwood and J.H. Underwood, and three of his minor grandchildren. *Id.* at 729-30, 89 So. 2d at 807-08.

[93] *Id.* at 730, 89 So. 2d at 808.

[94] *Id.* at 737, 89 So. 2d at 812.

[95] Named as defendants were C.R. Underwood, E.F. Underwood, J.H. Underwood, Florence Underwood, Alberta Luter, three minor grandchildren of C.R. Underwood, and

parties, by entering into transactions with the corporation while serving as its officers and directors, had violated their fiduciary duty to the corporation, and demanded that they be ordered to account for all profits received from the transactions.[96] In response, the defendants asserted various defenses, including ratification by the shareholders[97] and fairness of the transactions to the corporation.[98] After the chancery court rendered a decision for the defendants,[99] the corporation appealed to the Mississippi Supreme Court.

Justice Ethridge, writing for a majority of the court, drew a distinction between the liabilities of the defendants before and after the death of Roy Underwood in 1951.[100] Because Roy Underwood did not directly engage in leasing trucks to the corporation, the court found him to be a disinterested party. And because he represented both the directors and stockholders of Knox Glass of Pennsylvania, the court reasoned that the contracts had been ratified by the corporation.[101] Because of this disinterested representation, the court judged the transaction by the business judgment rule rather than by the standard of fairness[102] and held that the defendants were not liable for profits received from the truck leases during the period before Roy Underwood's death.[103]

W.E. Hester, Jr., a business partner of E.F. Underwood. *Id.* at 722, 89 So. 2d at 804.

[96] *Id.* at 722-23, 89 So. 2d at 804-05.

[97] The defendants argued that, after full disclosure, the leases were approved by Roy Underwood. By virtue of the authority given to Roy Underwood by Knox Glass of Pennsylvania, the defendants reasoned that this amounted to a ratification by the corporation. *Id.* at 723, 89 So. 2d at 805.

[98] *Id.* at 724, 89 So. 2d at 805. In addition, the defendants also asserted that they did not usurp a corporate opportunity, that they acted in good faith, and that the transactions should be judged by the business judgment rule. *Id.*, 89 So. 2d at 805.

[99] The chancellor held that the plaintiff corporation had failed to meet its burden of proving that the defendants were guilty of bad faith and fraud, which were needed in order to set aside the business judgment decision of the directors. The chancellor found that the leases actually benefitted the corporation by allowing it to ship freight at carload rates. In addition, the chancellor stated that the corporation ratified the leases by the continued use of the leased trucks until February, 1954. *Id.* at 738-39, 89 So. 2d at 812-13.

[100] Joining in this part of the majority opinion were Chief Justice McGehee and Justices Roberds, Hall, Lee, Kyle, and Arrington. *Id.* at 746, 89 So. 2d at 816.

[101] *Id.* at 747-48, 89 So. 2d at 817.

[102] *Id.* at 748, 89 So. 2d at 817.

[103] *Id.*, 89 So. 2d at 817. Justices Holmes, Ethridge, and Gillespie disagreed with the majority's distinction in the applicable period of liability, concluding that the defendants were liable for truck rentals received both before and after the death of Roy Underwood. *Id.* at 748-49, 89 So. 2d at 817.

The majority,[104] however, stated that the transactions after the death of Roy Underwood should be judged by a different standard because the corporation had no disinterested representation.[105] Accordingly, the court ordered the defendants[106] to account for all profits received from the truck rentals after January 1, 1952.[107]

The transactions in *Knox Glass* were clearly unfair to the corporation,[108] and the court reached the correct result in finding the directors liable for profits derived from the rentals. The distinction made in the applicable period of liability, however, and the broad language employed in the decision raise many questions about the status of interested directors' contracts in Mississippi.

The court found that Roy Underwood was disinterested and that the corporation thus had independent representation. There are two problems with this rationale. First, because Roy Underwood's brother and nephews had a direct financial interest in the transactions,[109] can

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[104] Joining in this part of the majority opinion were Chief Justice McGehee and Justices Hall, Kyle, Holmes, Ethridge, and Gillespie. *Id.* at 749, 89 So. 2d at 818.

[105] The court found that the transactions were clearly unfair to the corporation. *Id.* at 750-51, 89 So. 2d at 818. The court apparently did not base liability on the unfairness of the transaction, but rather on the fact that the corporation had no disinterested representation. The court stated: "[W]here the corporation is represented in the transaction by the interested fiduciaries, who deal with themselves, the contract is voidable merely because of the relationship . . . ." *Id.* at 750, 89 So. 2d at 818.

[106] All defendants, with the exception of Hester, were held jointly and severally liable for the net rentals received. *Id.* at 749, 89 So. 2d at 818. Miss Luter, though not serving as an officer and director during this period, was found liable on the theory that she participated with a fiduciary, C.R. Underwood, in a breach of his duty of loyalty to the corporation. *Id.* at 761-62, 89 So. 2d at 824.

Justice Lee dissented from this part of the opinion, contending that only the leases of C.R. Underwood, his wife, and those he executed in behalf of his minor grandchildren should be subject to an accounting. *Id.* at 776-78, 89 So. 2d at 831-32.

[107] The court held that the defendants were entitled to a reasonable time after the death of Roy Underwood in order to make the necessary changes in the rental agreements and found that October 18, 1951 to January 1, 1952 constituted a reasonable period. *Id.* at 750, 89 So. 2d at 818.

Justice Roberds, joined by Justice Arrington, dissented from this portion of the opinion, concluding that liability should date from March 15, 1953, the date C.R. Underwood was advised by his attorney that a potential conflict existed and that the leases should be ratified by the board and shareholders of Knox Glass of Pennsylvania. *Id.* at 788, 89 So. 2d at 837.

[108] In Tennessee Dressed Beef Co. v. Hall, 519 S.W.2d 805 (Tenn. Ct. App. 1974), which presented a fact situation similar to *Knox Glass*, the defendant directors and majority shareholders leased trucks to the corporation. In finding that the transactions were fair to the corporation, the court relied on the fact that the price charged for the rentals was lower than could be obtained elsewhere. *Id.* at 810.

[109] *Cf.* Jacobson v. Brooklyn Lumber Co., 184 N.Y. 152, 76 N.E. 1075, 1077-78 (1906)

it be said that he was truly disinterested? Second, under the common law rule regarding interested director transactions,[110] fairness remains a requirement even when the corporation has independent representation.[111] The court, however, validated the transactions, despite a finding of unfairness, by applying the business judgment rule to the transactions. The only rationale under which this validation by the court can be justified is that shareholder approval precludes an inquiry into the fairness of the transaction, which is a view not shared by the majority of jurisdictions.[112]

The court also found the directors liable for all profits derived during the time period in which the interested directors represented the corporation on both sides of the transaction.[113] The rationale employed by the court would indicate that anytime such a conflict exists, the transaction will be voidable by the corporation, regardless of fairness.[114] This conclusion is weakened by other language in the decision indicating that ratification or proof of fairness could save a contract from automatic voidability[115] and the fact that the transactions in question were obviously unfair.[116]

Knox Glass does not provide a clear answer to the question of when transactions between a corporation and its directors will be saved from automatic voidability. It appears that approval by a disinterested vote of the shareholders will prevent voidability.[117] Language employed in the decision could be interpreted to indicate that disclosure and approval by a disinterested majority of the board of directors will validate the transaction.[118] Less clear is the status of fairness alone as a

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(director, who was brother of interested director, held to be interested even though he had no direct pecuniary interest in transaction).

[110] *See supra* notes 8-24 and accompanying text.

[111] The *Knox Glass* court appeared to recognize this rule in the following passage: "[W]here . . . the corporation is represented by other persons independent of the director or officer . . . the burden of proof is upon the director or officer who seeks to uphold the transaction . . . to show its inherent fairness from the viewpoint of the corporation." 228 Miss. at 741, 89 So. 2d at 814.

[112] *See supra* notes 24, 37-70 and accompanying text.

[113] When one of the directors executed a lease to the corporation, another director would sign the lease on behalf of the corporation. 228 Miss. at 730, 89 So. 2d at 808.

[114] *See supra* note 105.

[115] *See infra* notes 118-19.

[116] 228 Miss. at 750-51, 89 So. 2d at 818.

[117] *See* Hodge & Perry, *supra* note 78, at 388.

[118] The court stated:

> This is a suit to recover from fiduciaries profits made from contracts in which they represented both themselves and the corporation. Where this conflict exists, *and where there is no full disclosure and ratification* by or estoppel of the

means of upholding the transaction.[119]

Subsequent Mississippi Supreme Court cases have done little to resolve the question. In *Smith v. Mississippi Livestock Producers Association,*[120] decided in 1966, the court did not automatically invalidate the transaction,[121] even though the corporation had no independent representation, but held that the director had not met his burden of proving the fairness of the transaction.[122] Yet two years later, in *Bentz v. Vardaman Manufacturing Co.,*[123] the court invalidated an interested director transaction[124] on two alternative grounds: (1) the corporation had no independent representation; and (2) the interested director did not sustain his burden of proving the fairness of the transaction.[125] In its latest major pronouncement on the subject, *Ellzey v. Fyr-Pruf, Inc.,*[126] the Mississippi Supreme Court indicated in dicta that a "self-dealing" transaction could be saved from voidability by a showing of disinterested approval by the board of directors *or* fairness.[127]

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corporation and its stockholders, equity requires the fiduciary to account for the profits . . . .

228 Miss. at 740-41, 89 So. 2d at 813 (emphasis added).

[119] "Where this conflict [corporate director represents both himself and the corporation] exists, . . . the burden of proof is on the director or officer to show its inherent fairness to the corporation." *Id.* at 741, 89 So. 2d at 813. Arguably, this passage in the court's opinion could refer to the situation in which disinterested approval by the shareholders or board of directors was obtained.

[120] 188 So. 2d 758 (Miss. 1966).

[121] This case involved a sale of land plus a loan to the corporation by the director, who later foreclosed on property secured by the loan. *Id.* at 761-62.

[122] *Id.* at 763-64.

[123] 210 So. 2d 35 (Miss. 1968).

[124] The transaction involved an agreement for one corporation (Vardaman) to supply frames to the second corporation (Jackson) to be used in the manufacture of chairs. As part of a loan agreement between the two corporations, Vardaman had earlier agreed to put one of the directors of Jackson (Mr. Bentz) on the board of directors of Vardaman. Vardaman subsequently brought suit to invalidate the supply agreement, alleging that the prices received for the frames were so low as to be unfair. *Id.* at 36-40.

[125] *Id.* at 40-41. The court found that Bentz so dominated the other directors at Vardaman that the corporation effectively had no independent representation. *Id.*

[126] 376 So. 2d 1328 (Miss. 1979). This case did not involve the supplying of goods or services to the corporation, but dealt with the directors' usurpation of a corporate opportunity. For an excellent analysis of the corporate opportunity doctrine, see Brudney & Clark, *A New Look at Corporate Opportunities,* 94 HARV. L. REV. 998 (1981).

[127] 376 So. 2d at 1332. The court stated:

> In its sweep, *Knox Glass* . . . holds that once a conflict of interest has been shown to exist between the pursuits of a corporation and its fiduciary the burden rests upon the fiduciary to establish ratification upon full and continuing disclosure of material facts, inherent fairness, or other circumstances tending to show discharge by the fiduciary of his duty to the corporation. Specifically,

IV. Criticisms and Proposals for Reform

The fairness test as a means of striking a balance between the common law view of automatic voidability and the potential for bona fide management action has been subjected to much criticism. By its very nature, it is an uncertain standard,[128] which makes the validity of prospective transactions between a director and his corporation very difficult to predict.[129] Judges reviewing such transactions for fairness are called upon to make complicated business judgments.[130] In addition, the threat of personal liability for engaging in such a transaction has arguably discouraged qualified men and women from serving on corporate boards of directors.[131]

Proponents of the fairness test argue that it must be retained in order to protect shareholders from abusive self-dealing by directors.[132] Indeed, some commentators maintain that the current standards have done little to protect the shareholders in this situation.[133] It is argued that interested director transactions are typically challenged in only two instances: (1) when new management gains control of the corporation, or (2) when shareholders of the corporation bring a shareholder derivative suit.[134] Because of procedural barriers, such as a requirement that security for costs be posted,[135] shareholder derivative suits

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> *Knox* holds that "self-dealing," i.e., a situation in which the corporation and its fiduciary bargain on opposite sides (lessor/lessee, seller/buyer, etc.) of the transaction forming the basis of the suit, automatically raises a presumptive conflict of interest, thus shifting the burden to the fiduciary to justify his conduct.
>
> Presently we reaffirm *Knox* . . . .

Id.

[128] *See supra* notes 76-77 and accompanying text.

[129] The uncertainty of the fairness test may restrain a director from entering into a legitimate transaction with the corporation. On the other hand, the lack of a clear standard may lead dishonest directors to gamble on the probability that the transaction will be found fair. Bulbulia & Pinto, *supra* note 39, at 226.

[130] *See, e.g.*, Knox Glass Bottle Co. v. Underwood, 228 Miss. at 719, 89 So. 2d at 803 (trial record consisted of 16 volumes, containing multitudinous findings of fact).

[131] Mattar, *Indemnification and Liability Insurance for Corporate Boards of Directors and Trustees—A Legal Guide for the Director*, 83 Com. L.J. 550, 550 (1978).

[132] *See* Bulbulia & Pinto, *supra* note 39, at 228.

[133] *See* Marsh, *supra* note 5, at 54-57; Comment, *supra* note 37, at 663-64.

[134] Marsh, *supra* note 5, at 55.

[135] *See, e.g.*, Cal. Corp. Code § 800(d) (West 1977); N.Y. Bus. Corp. Law § 627 (McKinney Supp. 1981-1982). The purpose of these statutes is to discourage unmeritorious suits against the corporation. *See* 13 W. Fletcher, *supra* note 9, § 5971.1 (rev. perm. ed. 1980). Mississippi has not enacted a similar statute.

are not prevalent.[136]

Various proposals for reform have been presented. Because interested director transactions are primarily governed by state law,[137] one authority has advocated replacing the current system of state incorporation with a federal system of incorporation.[138] Another commentator, finding federal incorporation politically unrealistic, has proposed adoption of federal standards of corporate responsibility.[139] Yet another recommendation is that the Securities and Exchange Act of 1934 be amended to require SEC approval of any interested director transac-

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[136] A study of 190 corporations, including the 50 largest corporations as rated by FORTUNE, found that the average company experienced a shareholders derivative or class action suit only once every 6.7 years. Jones, *An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits, 1971-1978*, 60 B.U.L. REV. 306, 323 (1980).

[137] If the transaction involves the sale or purchase of securities, it may be within the scope of federal laws regulating the issuance and sale of securities. *See* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 12-13 (1971) (rule 10b-5 applies to cases of internal corporate mismanagement). The United States Supreme Court has more recently expressed a reluctance to interfere with corporate mismanagement, concluding that, unless the federal securities laws clearly apply, the appropriate remedy should lie in the state courts. Santa Fe Indus. v. Green, 430 U.S. 462, 478-79 (1977).

[138] Schwartz, *A Case for Federal Chartering of Corporations*, 31 BUS. LAW. 1125 (1976). Schwartz has noted that because of the national scope and impact of corporate enterprises there exists a need to apply national law to these businesses. *Id.* To meet the need for national uniformity, Schwartz has proposed a comprehensive federal chartering statute, which would apply federal standards consistently to all facets of corporation law. *Id.* at 1139.

[139] Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 700-01 (1974). Cary has proposed a Federal Corporate Uniformity Act, which would apply to all companies engaged in or affecting interstate commerce, except closely-held companies. *Id.* at 702. Though this proposal suggests retention of state incorporation, it would subject corporations to the jurisdiction of federal courts under general standards. The following provisions would be included in the Act:

> (1) federal fiduciary standards with respect to directors and officers and controlling shareholders; (2) "interested directors" provision prescribing fairness as a prerequisite to any transaction; (3) a requirement of certain uniform provisions to be incorporated in the certificate of incorporation: for example, authority to amend by-laws, initiate corporate action, or draw up the agenda of shareholders' meetings shall not be vested exclusively in management; (4) a more frequent requirement of shareholder approval of corporate transactions, with limits placed upon the number of shares authorized at any one time; (5) abolition of nonvoting shares; (6) the scope of indemnification of directors specifically prescribed and made exclusive; and (7) adoption of a long-arm provision comparable to § 27 of the Securities Exchange Act to apply to all transactions within the corporate structure involving shareholders, directors, and officers.

Id.

tion involving a company covered by the Act.[140] The rationale behind the proposals for federal action in this area is that state law does not effectively address the problem.[141]

CONCLUSION

Few would argue that a "bright-line" rule regarding the validity of interested director's contracts would be a welcome relief from the uncertainties created by the confused body of law that currently controls the subject. The problem in establishing such a rule arises from the numerous interests that such a rule must protect. These interests—to preserve fiduciary duty, to protect shareholders, to recognize modern business necessities, to offer companies a competitive incentive to incorporate within the state, and to provide certainty in the status of contracts between a corporation and its directors—are not always compatible.[142] The question, then, is what standard best balances the needs for management efficiency and shareholder fairness.

It is submitted that the Mississippi Legislature should enact a statute that clearly delineates the procedure by which an interested director transaction may be validated. Section 41 of the Model Act does not meet this requirement,[143] but a recently enacted Minnesota statute[144] appears to set clearer standards. The statute provides that

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[140] Marsh, *supra* note 5, at 73-76. Under this proposal, a corporation would be prohibited from contracting with an "affiliated person," which includes the directors of the corporation. Transactions would be exempted from this absolute prohibition, however, if the Securities and Exchange Commission determined that the transaction was fair to the corporation. *Id.* at 74-75.

[141] This is due to a corporation's ability to incorporate in one state, while qualifying to do business in another state. Accordingly, it is extremely difficult for any one state to impose management standards that are stricter than those of other states because of the likelihood that domestic businesses would incorporate in a more favorable state. Among other results, this would mean a loss of revenue to the state where the business did not incorporate. Folk, *State Statutes: Their Role in Prescribing Norms of Responsible Management Conduct*, 31 BUS. LAW. 1031, 1034, 1065 (1976).

[142] Comment, *supra* note 77, at 658.

[143] *See* Note, *supra* note 72, at 923.

[144] MINN. STAT. ANN. § 302A.255 (West Supp. 1981). The statute provides:

> Subd. 1. Conflict; procedure when conflict arises. A contract or other transaction between a corporation and one or more of its directors, or between a corporation and an organization in or of which one or more of its directors are directors, officers, or legal representatives or have a material financial interest, is not void or voidable because the director or directors or the other organizations are parties or because the director or directors are present at the meeting of the shareholders or the board or a committee at which the contract or transaction is authorized, approved, or ratified, if:

any transaction between a corporation and its directors[145] is not voidable if (1) the transaction is approved by the disinterested directors, after full disclosure of material facts regarding the transaction and the director's interest, or (2) the transaction is approved by the disinterested shareholders, after full disclosure by the interested director, or (3) the interested director sustains the burden of proving that the contract was fair and reasonable to the corporation at the time of approval. Although fairness is not required in the event of director or shareholder approval, it is submitted that shareholders are adequately protected by the provision prohibiting the interested director's vote from being counted either in a board vote—whether toward approval of the vote or in determining the presence of a quorum—or in a shareholder vote. In the event that the interested director fails to obtain board or shareholder approval, he retains the ability to validate the

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(a) The contract or transaction was, and the person asserting the validity of the contract or transaction sustains the burden of establishing that the contract or transaction was, fair and reasonable as to the corporation at the time it was authorized, approved, or ratified;

(b) The material facts as to the contract or transaction and as to the director's or directors' interest are fully disclosed or known to the shareholders and the contract or transaction is approved in good faith by the holders of a majority of the outstanding shares, but shares owned by the interested director or directors shall not be counted in determining the presence of a quorum and shall not be voted; or

(c) The material facts as to the contract or transaction and as to the director's or directors' interest are fully disclosed or known to the board or a committee, and the board or committee authorizes, approves, or ratifies the contract or transaction in good faith by a majority of the board or committee, but the interested director or directors shall not be counted in determining the presence of a quorum and shall not vote.

Subd. 2. Material financial interest. For purposes of this section:

(a) A director does not have a material financial interest in a resolution fixing the compensation of the director or fixing the compensation of another director as a director, officer, employee, or agent of the corporation, even though the first director is also receiving compensation from the corporation; and

(b) A director has a material financial interest in each organization in which the director, or the spouse, parents, children and spouses of children, brothers and sisters and spouses of brothers and sisters of the director, or any combination of them have a material financial interest.

Id.

[145] The statute also applies to transactions between two corporations that have a common director in the event the common director has a material financial interest in the transaction. Also, the director is assumed to have a material financial interest in any organization in which certain relatives of the director have a material financial interest. *Id.* § 302A.255(2)(b).

transaction by proving its inherent fairness to the corporation. The Minnesota statute thus adequately protects the interests of corporate shareholders, while giving management the needed flexibility to direct efficiently the corporation. It is proposed that the Mississippi Legislature enact a similar statute in order to clarify this important area of corporate law.

The Minnesota statute is not couched in terms of validating the transaction; it provides that the statutory procedure saves the contract from automatic voidability.[146] In order to avoid the validation/non-validation dilemma that has accompanied the enactment of the Model Act,[147] the proposed Mississippi statute should make clear that following the statutory procedure has the effect of validating the transaction.[148]

In the absence of such legislative action, practicing attorneys may be asked to advise clients on the feasability of entering into contracts with corporations in which they are directors. The following steps are suggested to protect the transaction from later attack: (1) the interested director should not negotiate the transaction on behalf of the corporation;[149] (2) the transaction should be approved by a vote of the board of directors, with the interested director's vote counted neither toward approval nor toward determination of a quorum;[150] and (3) an independent appraiser should make a written report on the fairness of the transaction prior to approval.[151] Of course, shareholder ratification, though sometimes expensive, remains the safest way to ensure the transaction's validity.[152]

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[146] *Id.* § 302A.255(1).

[147] *See supra* notes 32-77 and accompanying text.

[148] This result could be accomplished by replacing MINN. STAT. ANN. § 302A.255(1) with the following language:

> Subd. 1. Conflict; procedure when conflict arises. A contract or other transaction between a corporation and one or more of its directors, or between a corporation and an organization in or of which one or more of its directors are directors, officers, or legal representatives or have a material financial interest, *is validated even though* the director or directors or the other organizations are parties or the director or directors are present at the meeting of the shareholders or the board or a committee at which the contract or transaction is authorized, approved, or ratified, if: . . . .

[149] *See supra* note 71.

[150] *See supra* note 13 and accompanying text.

[151] *See Duties and Liabilities of Corporate Directors*, 22 BUS. LAW. 29, 131 (1966).

[152] *See supra* notes 24, 115 and accompanying text.

RECENT DECISIONS

Federal Procedure—Discovery Sanctions—Personal Jurisdiction May Be Established Through Application of a Discovery Sanction Without Violating Due Process

Plaintiff[1] filed a two count suit in the United States District Court for the Western District of Pennsylvania[2] against various insurance companies[3] to recover proceeds on business interruption policies.[4] When certain defendants[5] raised the defense of lack of personal jurisdiction,[6] the plaintiff attempted to use discovery[7] to demonstrate the

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[1] Plaintiff Compagnie des Bauxites de Guinee is a Delaware corporation with its principal place of business in the Republic of Guinea, where it operates bauxite mines and processing facilities. Halco Mining, Inc., which operates in Pennsylvania, owns 51% of plaintiff and had contracted to perform administrative services for plaintiff, including the procurement of business interruption insurance. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 102 S. Ct. 2099, 2101 (1982).

[2] *Id.* at 2102. Plaintiff based jurisdiction on diversity of citizenship. 28 U.S.C. § 1332(a) (supp. 1982) provides, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state." *Id.*

[3] The first count was brought against Insurance Company of North America, which had provided half of the $20,000,000 worth of business interruption insurance covering plaintiff's operations in Guinea. The second count was brought against 21 foreign insurance companies. Identified as "excess insurers," these companies provided the remaining business interruption coverage. 102 S. Ct. at 2102.

[4] *Id.* at 2102. After acquiring the coverage, plaintiff experienced mechanical problems in its Guinea operation, resulting in a business interruption loss allegedly in excess of $10,000,000. *Id.*

[5] These defendants consisted of 17 of the 21 foreign insurance companies in the second count of the suit. *Id.* at 2101.

[6] *Id.* at 2102. Fed. R. Civ. P. 12(b)(2) authorizes a motion to dismiss based upon the defense that the court lacks jurisdiction over defendant's person. *See infra* note 48.

[7] Fed. R. Civ. P. 26(b)(1) permits parties to "obtain in discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Courts have recognized that this rule was intended to permit generally unrestricted access to information for trial preparation. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2007 (1970); *see, e.g.*, Harris v. Nelson, 394 U.S. 286, 297 (1969); Pierson v. United States, 428 F. Supp. 384, 390 (D. Del. 1977).

existence of in personam jurisdiction.[8] After defendants repeatedly failed to comply with court orders requiring production of the requested information,[9] the district court established personal jurisdiction as a sanction for defendants' failure to comply with the court's order.[10] The United States Court of Appeals for the Third Circuit affirmed, concluding that imposition of the discovery sanction fell within the trial court's discretion under rule 37(b) of the Federal Rules of Civil Procedure and that the sanction did not violate defendants' due process rights.[11] On appeal, the United States Supreme Court, *held,* affirmed. Personal jurisdiction may be established by means of a discovery sanction for failure to comply with a discovery order without violating due process. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 102 S. Ct. 2099 (1982).

Though it did not involve a discovery issue, *Hovey v. Elliott,*[12] rendered in 1897, stands as the United States Supreme Court's first extensive analysis of the discretionary power of a court to apply and enforce

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[8] 102 S. Ct. at 2102. Plaintiff was seeking files to policies that were either delivered in Pennsylvania or covered a risk that was located in Pennsylvania. *Id.*

[9] The court granted several extensions to defendants in an effort to allow them to complete discovery. In addition, the court warned that unless they complied with the discovery order, jurisdiction would be assumed as a sanction in accordance with *Fed. R. Civ. P.* 37(b)(2)(A). 102 S. Ct. at 2102-03.

Rule 37(b) provides that if a party fails to abide by a court order to provide requested information, the court may make such orders in regard to the failure as are just, including "[a]n order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order . . . ." FED. R. CIV. P. 37(b)(2)(A).

[10] Compagnie des Bauxites de Guinee v. Insurance Co. of N. Am., 651 F.2d 877, 880 (3d Cir. 1981), *cert. granted sub nom.* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 102 S. Ct. 502 (1982). The district court found personal jurisdiction under two distinct theories. First, under FED. R. CIV. P. 37(b)(2)(A), the court established personal jurisdiction as a sanction for defendants' failure to comply with the discovery order. Alternatively, the court found that defendants' activities brought them within the purview of the Pennsylvania long-arm statute. 42 PA. CONS. STAT. ANN. § 5322 (1978). 651 F.2d at 880.

[11] 651 F.2d at 885-86. The fifth amendment provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Due process requires that the relationship between the defendant and the forum state be sufficient to justify the court's exercise of jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980); *see infra* note 49.

[12] 167 U.S. 409 (1897). This case involved a defendant who had been ordered to pay into the registry of the Supreme Court of the District of Columbia an award from a claims arbitration commission. The defendant filed an answer but refused to make the payment. The court struck down his answer and entered a default judgment against him. Defendant collaterally attacked this judgment on the theory that his due process rights had been violated. *Id.* at 411-13.

sanctions when faced with a party's refusal to obey an order.[13] The *Hovey* Court held that when a court has summoned a defendant to answer and has obtained jurisdiction by the summons, it cannot deny that defendant a hearing on the ground that he is in contempt of court.[14]

Twelve years later, in *Hammond Packing Co. v. Arkansas*,[15] the Supreme Court declined to apply the *Hovey* reasoning in a discovery context. An Arkansas statute[16] provided that when a defendant refused to comply with a court order to produce documentary evidence, he would be presumed to admit the material facts alleged against him.[17] In upholding the statute, the Supreme Court distinguished the *Hovey* decision, reasoning that the default entered against the *Hovey* defendant was a punitive measure.[18] The Court also noted that in *Hovey* there was a denial of due process resulting from the court's refusal to hear the case, while in *Hammond Packing* due process was preserved by the legitimate presumption that flowed from the defendant's refusal to produce.[19]

Prior to the adoption of the Federal Rules of Civil Procedure in 1938,[20] party pleadings provided the main vehicle for giving notice to the parties, formulating the issues, and disclosing the facts of the case.[21] With the advent of notice pleading, the discovery system,[22] out-

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[13] *Id.* at 413.

[14] *Id.* at 413-14; *see also* Watts, Watts & Co. v. Unione Austriaca & Co., 248 U.S. 9, 22 (1918) (defendant entitled to defend before a judgment may be entered); Murray v. Magnolia Petroleum Co., 23 F.2d 347, 348 (N.D. Tex. 1927) (allegations of answer may be determined only after evidence has been heard).

[15] 212 U.S. 322 (1909).

[16] Act of Jan. 23, 1905, No. 1, § 9, 1, 1905 Ark. Acts 9 (current version at ARK. STAT. ANN. § 70-109 (1947)).

[17] 212 U.S. at 339-40. The trial court had granted a motion to strike defendant's pleadings and had entered a default judgment after defendant failed to comply with an order to produce documents sought by plaintiff. *Id.*

[18] *Id.* at 351.

[19] *Id. See generally* Note, *Standards for Imposition of Discovery Sanctions*, 27 ME. L. REV. 247, 265-68 (1975).

[20] The Federal Rules of Civil Procedure were promulgated by the Rules Enabling Act, which provides, "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts . . . ." The Rules Enabling Act of June 25, 1948, ch. 646, 62 Stat. 961 (now codified as amended at 28 U.S.C. § 2072 (1976)).

[21] Note, *The Use of Discovery to Obtain Jurisdictional Facts*, 59 VA. L. REV. 533, 533 (1973).

[22] Discovery is the process by which a party obtains information and other materials relevant to a pending lawsuit. *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 942 (1961).

lined in the Federal Rules of Civil Procedure,[23] was intended to expedite the litigation process[24] and to provide for the full disclosure of all relevant facts prior to trial.[25] Rule 37(b) established various sanctions[26] for the failure to abide by discovery rules and was intended to be the exclusive source of authority to enforce compliance.[27] Although rule 37 was originally drafted to conform to the due process guidelines expressed in *Hovey* and *Hammond Packing*, [28] neither the rule nor the accompanying advisory committee comments provided satisfactory limitations for the exercise of the discretionary sanctioning power granted the district courts.[29]

Further interpretation and elucidation of *Hovey* and *Hammond*

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[23] FED. R. CIV. P. 26-37.

[24] The drafters of the Federal Rules of Civil Procedure sought to develop a procedural system that would "secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 7, § 1029.

[25] *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 500-01 (1947) (device to narrow and clarify basic issues and for ascertaining facts relative to those issues); Patton v. Southern Bell Tel. & Tel. Co., 38 F.R.D. 428, 429 (N.D. Ga. 1965) (scope of discovery to be liberally construed to provide information essential to proper litigation); Mills Music, Inc. v. Cromwell Music, Inc., 14 F.R.D. 411, 413 (S.D.N.Y. 1953)("fishing expeditions" are permissible).

[26] Under rule 37 a party who fails to comply with discovery orders incurs the risk of serious consequences, which may include the entry of an order that designated facts be taken as established; the entry of an order refusing the disobedient party the right to support or oppose designated claims or defenses; striking out pleadings or parts of pleadings; dismissal of claims or defenses; rendering judgment by default; imprisonment for contempt of court; or assessment of costs and attorney's fees. FED. R. CIV. P. 37(b)(2); *see infra* note 42.

[27] For a critical analysis of rule 37 prior to the 1970 amendment, see Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 *passim* (1958). *See generally* Werner, *Survey of Discovery Sanctions*, 1979 ARIZ. ST. L.J. 299, 301 (system intended to require little judicial intervention and maximum disclosure of facts to avoid surprise at trial).

[28] The Advisory Committee note to original rule 37 explained that the rule was in accord with the *Hammond Packing* decision, which distinguished between the justifiable use of sanctions as a means of compelling the production of evidence and their unjustifiable use, as in *Hovey*, for the purpose of punishing for contempt. FED. R. CIV. P. 37 advisory committee note (1937).

[29] Note, *Discovery Sanctions Under the Federal Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37*, 29 CASE W. RES. 603, 616 (1979). Courts have been reluctant to apply sanctions when to do so would deny a litigant a hearing on the merits. *See, e.g.*, Pioche Mines Consol. v. Dolman, 333 F.2d 257, 270 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965); Gill v. Stolow, 240 F.2d 669, 670 (2d Cir. 1957). The difficulty with a literal adherence to the idea that reaching the merits is of primary importance is that it reduces the effectiveness of sanctions intended to compel compliance with procedural rules. Rosenberg, *supra* note 27, at 480.

Packing, as well as a construction of rule 37, were in order when the Supreme Court addressed these issues in *Societe Internationale pour Participationes Industrielles et Commerciales, S.A. v. Rogers.*[30] *Societe Internationale* involved a plaintiff whose failure to comply with a discovery order was due to inability, rather than willfulness, bad faith, or fault.[31] The Court construed rule 37 in light of the due process clause and held that when it is established that the failure to comply with discovery is due to inability and not to willful noncompliance, the sanction of dismissal may not be imposed.[32] Hence, *Hovey*, *Hammond Packing*, and *Societe Internationale*, by pointing to due process limitations without clearly defining them,[33] contributed greatly to the federal courts' reluctance to impose harsh sanctions.[34]

With the intention of eliminating the confusion over the willfulness interpretation of *Societe Internationale*, the Advisory Committee extensively revised rule 37 in 1970[35] by eliminating all reference to

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[30] 357 U.S. 197 (1958).

[31] *Id.* at 198-203. Plaintiff was unable to comply with the court's discovery order when the Swiss government constructively impounded the documents sought by defendant. As a result, for plaintiff to have produced the documents would have violated Swiss law and might have led to imposition of a fine and imprisonment. The District Court for the District of Columbia found that plaintiff had shown good faith in its efforts to comply, but nevertheless dismissed the suit under rule 37(b)(2). 357 U.S. at 198-203.

[32] 357 U.S. at 209. The Court emphasized the presence of willful misconduct as a factor in determining the sanction to be imposed. It stated unequivocally that no willfulness is necessary to implement rule 37(b), but added that, absent willfulness, the case may not be dismissed for failure to produce. 357 U.S. at 207-08, 212. *But see* Dorsey v. Academy Moving & Storage, 423 F.2d 858, 860 (5th Cir. 1970); *cf.* Flaks v. Koegel, 504 F.2d 702, 709 (2d Cir. 1974) (default judgment upheld only if defendant's failure to comply due to willfulness, bad faith, or fault); General Dynamics Corp. v. Selb Mfg., 481 F.2d 1204, 1211 (8th Cir. 1973) (noncompliance must be due to fault, willfulness, or bad faith in order to justify imposition of sanctions), *cert. denied*, 414 U.S. 1162 (1974). *See generally* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1042-43 (1978)(lower courts interpreted *Societe Internationale* as limiting rule 37(b) sanctions to instances when party's failure to comply was willful and made in bad faith).

[33] The *Hovey* Court found that a default judgment sanction violated due process in that the party was denied the opportunity to be heard on his own behalf. *Hammond Packing* preserved due process by the presumption that a refusal to produce requested information was but an admission of want of merit in the asserted defense. The Court in *Societe Internationale* reasoned that without willful noncompliance, stringent sanctions may not be imposed. These due process limitations were not clearly defined in a manner to permit a judicially cognizable application. *See supra* notes 14, 19 and accompanying text.

[34] *See, e.g.*, Hinson v. Michigan Mut. Liab. Co., 275 F.2d 537, 539 (5th Cir. 1960); Roth v. Paramount Pictures Corp., 8 F.R.D. 31, 31 (W.D. Pa. 1948).

[35] Rule 37 was revised to provide sanctions for different degrees of noncompliance,

"willful conduct" and "refusal to disclose." Thus the rule was expanded to include negligent and good faith failures to cooperate in discovery.[36] Willfulness, however, remained a factor in determining the appropriate severity of the sanctions to be applied.[37]

National Hockey League v. Metropolitan Hockey Club, Inc.[38] was the first interpretation of rule 37 sanctions made by the Supreme Court after the 1970 rule revision.[39] The Court in *National Hockey League* emphasized that impositions of rule 37(b) sanctions were nec-

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to eliminate inconsistencies, and to permit courts to respond reasonably to violations. Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 291 (1968). With sanctions now available for negligent noncompliance, a showing of willfulness is no longer required. 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 37.01[8] (2d ed. 1982).

[36] Note, *supra* note 31, at 618. The confusion of the lower courts' varying interpretations of *Societe Internationale* was resolved by the elimination of the term "refusal" and the use of the term "failure" throughout rule 37. The change made it clear that negligent noncompliance would be subject to sanctions. FED. R. CIV. P. 37 advisory committee note (1970). *See generally* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 21-22 (1978) (1970 amendments were intended to encourage more frequent imposition of sanctions when discovery rules abused).

[37] Note, *supra* note 31, at 618. The courts have utilized discretion in determining the severity of the sanction imposed in an effort to enforce compliance with discovery orders without precluding a decision on the merits. *See, e.g.*, Brown v. McCormick, 608 F.2d 410, 412, 414 (10th Cir. 1979) (default judgment warranted when defendants failed to answer by extension date, changed attorneys twice, and failed to appear at deposition); Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374-75 (10th Cir.) (defendant prohibited from introducing evidence opposing claims that plaintiff sought to prove through use of documents requested but not produced), *cert. denied*, 439 U.S. 833 (1978); Emerick v. Fenick Indus., 539 F.2d 1379, 1381 (5th Cir. 1976) (defendant's flagrant failure to comply after four months warranted default judgment); General Dyamics Corp. v. Selb Mfg., 481 F.2d 1204, 1211 (8th Cir. 1973) (refusal by defendant to respond to discovery concerning its counterclaim resulted in striking of defendant's affirmative defense and dismissal of counterclaim), *cert. denied*, 414 U.S. 1162 (1974); General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 308 (S.D. Cal. 1981) (facts that defendant sought to establish with documents withheld by plaintiff presumed established, subject to rebuttal); Szilvassy v. United States, 71 F.R.D. 589, 594 (S.D.N.Y. 1976) (repeated failure to comply warranted imposition of costs of motion for sanctions); *cf.* Newton v. Walling 139 F.2d 608, 610 (9th Cir.) (witness who disobeyed court order to answer questions at deposition jailed for contempt), *cert. denied*, 321 U.S. 798 (1944). For an evaluation of the reasonableness of specific sanctions in particular circumstances, see Werner, *supra* note 27, at 325-31.

[38] 427 U.S. 639 (1976). Plaintiff failed to comply with discovery orders on time, and the trial court dismissed the action, finding "flagrant bad faith" and "callous disregard" on the part of plaintiff. *Id.* at 640.

[39] Epstein, Corcoran, Kreiger & Carr, *An Up-Date on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Clubs [sic], Inc., 84 F.R.D. 145, 145 (1980).*

essary to deter parties from disregarding discovery orders of district courts.[40] Despite the emphasis on deterrence endorsed by the Court in *National Hockey League,* a traditional and more lenient approach to the imposition of discovery sanctions remained viable in the lower courts.[41]

The Federal Rules of Civil Procedure permit parties to obtain discovery concerning any matter relevant to a defense.[42] When, however, the matter sought to be discovered relates to the personal jurisdiction of a court over a defendant,[43] the court's ability to enforce discovery orders and impose sanctions under rule 37(b) may be more limited.[44] Certain courts of appeal have divided on whether and to what extent discovery sanctions will operate to create in personam jurisdiction.

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[40] 427 U.S. at 643. The court reasoned that the most severe sanctions provided under rule 37(b) must be available to the district courts in appropriate cases, not only to penalize those who fail to comply with discovery orders, but also to deter those who might consider such conduct if this deterrent did not exist. *Id.*

[41] *See, e.g.*, Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 100 (3d Cir. 1977); Edgar v. Slaughter, 548 F.2d 770, 773 (8th Cir. 1977).

[42] FED. R. CIV. P. 26(b)(1). If the party from whom discovery is sought fails to respond to the request, the party seeking discovery may move for a court order compelling response. FED. R. CIV. P. 37(a); *see, e.g.*, Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287, 295 (D. Del. 1975); United States v. IBM, 66 F.R.D. 215, 218 (S.D.N.Y. 1974); Teledyne Indus. v. Eon Corp., 373 F. Supp. 191, 203 (S.D.N.Y. 1974).

[43] Personal jurisdiction must be distinguished from subject matter jurisdiction. Due process requires that both federal and state courts have personal jurisdiction over the defendant. Federal courts, however, are courts of limited jurisdiction and must also have subject matter jurisdiction. *See* FED. R. CIV. P. 8(a)(1); FTC v. COMPAGNIE DE SAINT-GOBAIN-PONT-A-MOUSSON, 636 F.2d 1300, 1318 (D.C. Cir. 1980); Rankin v. Howard, 633 F.2d 844, 848 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981).

A presumption exists that a court lacks personal jurisdiction. To rebut this presumption, a plaintiff initially need only allege facts that indicate personal jurisdiction exists. If these facts are challenged, however, the burden is on the party claiming jurisdiction to persuade the court that jurisdiction does exist. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936); *see, e.g.*, Stern v. Beer, 200 F.2d 794, 796 (6th Cir. 1952) (plaintiff must support jurisdictional averments with proof when jurisdiction is challenged); Continental Mining & Milling Co. v. Migliaccio, 16 F.R.D. 217, 219 (D. Utah 1954) (if jurisdictional averments are challenged by pleading or motion, plaintiff must support them with competent proof).

[44] *Compare* Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434, 435-36 (5th Cir. 1981) (rule 37(b)(2) sanction unavailable when existence of personal jurisdiction is in doubt) *with* Lekkas v. Liberian M/V Caledonia, 443 F.2d 10, 11 (4th Cir. 1971) (per curiam) (sanctions granted for failure to comply with court ordered jurisdictional discovery). *See generally* Note, *Sanctions to Enforce Jurisdictional Discovery: Constitutional and Prudential Limitations*, 68 VA. L. REV. 921, 943 (1982) (due process may prevent enforcement of discovery orders or imposition of sanctions against defendants over whom personal jurisdiction may not exist).

In *Lekkas v. Liberian M/V Caledonia*,[45] the Fourth Circuit endorsed the use of rule 37 sanctions for the failure to comply with a court order compelling jurisdictional discovery.[46] The *Lekkas* court held that by contesting personal jurisdiction a defendant assumes the obligation of providing requested information necessary for the resolution of his motion,[47] and a subsequent failure to disclose facts necessary for a decision of the jurisdictional issue merits the application of rule 37 sanctions.[48] The Eighth Circuit addressed the question of imposing sanctions to enforce jurisdictional discovery in *English v. 2lst Phoenix Corp.*[49] The court held that the district court had properly applied the discovery sanction in determining that out-of-state corporations had sufficient contacts with the forum state to support personal jurisdiction.[50] The court concluded that defendants' due process rights were not violated because their actions amounted to a waiver[51] of their

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[45] 443 F.2d 10 (4th Cir. 1971).

[46] *Id.* at 11. Three Greek sailors sought recovery for personal injuries, wages, maintenance, and repatriation. They argued that personal jurisdiction was established since the ship was controlled by American interests and sought to prove jurisdiction through discovery. Defendants refused to identify adequately the owner of the ship upon which the seamen's injuries had occured. *Id.*

[47] *Id.; see* United States v. UMW, 330 U.S. 258, 293 (1947) (if federal court jurisdiction is questioned, the court has power to determine jurisdictional issue); American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932) (a finding that jurisdiction exists binds the party, and he cannot later collaterally attack judgment on basis of court's lack of personal jurisdiction); Atlantic Las Olas, Inc. v. Joyner, 466 F.2d 496, 498 (5th Cir. 1972) (federal court has power to determine jurisdictional issue); Bruce v. Fairchild Indus., 413 F. Supp. 914, 916 (W.D. Okla. 1974) (same); *see also* Note, *supra* note 49, at 932-33 (after defendant submits to court's jurisdiction to determine jurisdiction, defendant assumes an obligation to furnish all pertinent information relating to existence of personal jurisdiction, and his failure to do such may be cause for a sanction under rule 37(b)(2)).

[48] 443 F.2d at 11.

[49] 590 F.2d 723 (8th Cir. 1979). The corporate defendants in *English* had been granted several extensions to submit answers to interrogatories, and in each case the deadlines were missed or unresponsive answers were given. Ultimately, the district court entered an order establishing jurisdiction over the defendants. *Id.* at 727.

[50] *Id.* at 728. The defendants did not object at trial when the district court imposed sanctions by recognizing the sufficiency of contacts to establish personal jurisdiction. It was on appeal that defendants argued for the first time that the district court lacked jurisdiction to impose the sanction. *Id.* at 727. This is significant in that rule 12(h)(1) provides that "a defense of lack of jurisdiction over the person . . . is waived . . . if it is [not] included in a responsive pleading." FED. R. CIV. P. 12(h)(1).

[51] 590 F.2d at 728 n.5. The court relied on United States v. Gajewski, 419 F.2d 1088, 1091 (8th Cir. 1969), *cert. denied*, 397 U.S. 1040 (1970), in holding that in personam jurisdiction, unlike subject matter jurisdiction, may be waived by actions of the party, and a court has jurisdiction to enter an order finding a waiver. 590 F.2d at 728 & n.5; *see* SEC v. Blazon Corp., 609 F.2d 960, 965 (9th Cir. 1979) (party can confer personal juris-

right to contest the court's assumption of personal jurisdiction.[52]

In 1980, the Fifth Circuit contravened the Fourth Circuit's *Lekkas* decision[53] in *Familia de Boom v. Arosa Mercantil.*[54] The court determined that when personal jurisdiction over a defendant is uncertain, a default judgment could not be imposed as a sanction for failing to comply with a court order compelling jurisdictional discovery.[55] The Fifth Circuit soon had the occasion to broaden the scope of *Familia de Boom* in *Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc.*[56] In *Aetna,* the court held that a district court may not strike a defendant's claim of lack of personal jurisdiction as a sanction for that party's failure to comply with discovery.[57] Thus, the court reasoned that even the more lenient sanctions of rule 37(b)(2) were unavailable to enforce jurisdictional discovery if an independent determination of in personam jurisdiction over defendant cannot be made.[58]

In the instant case, the Court reasoned that the requirement of personal jurisdiction[59] may be intentionally waived,[60] and since, for va-

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diction by expressly consenting to it); Alger v. Hayes, 452 F.2d 841, 842-43 (8th Cir. 1972) (lack of personal jurisdiction may be waived if not timely asserted or properly preserved); FTC v. Browning, 435 F.2d 96, 99-100 n.7 (D.C. Cir. 1970) (objections to personal jurisdiction may be waived); Stavang v. American Potash & Chem. Corp., 344 F.2d 117, 118-19 (5th Cir. 1965) (lack of personal jurisdiction waived by defendant who first proceeds on merits); *see also* Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938) (although a party's jurisdictional objections are not waived when he appears for the purpose of raising objections, he does waive objections to court's authority to rule on jurisdictional issue).

[52] 590 F.2d at 728. For an analysis of the concept of waiver in a jurisdictional dispute, see Murphy, *The Use of Rule 37(b) Sanctions to Enforce Jurisdictional Discovery,* 50 FORDHAM L. REV. 814, 820-26 (1982).

[53] *See supra* notes 45-48 and accompanying text.

[54] 629 F.2d 1134 (5th Cir. 1980). This case involved a defendant's motion to dismiss for lack of jurisdiction and plaintiff's attempts to establish jurisdiction through discovery. *Id.* at 1136-37.

[55] *Id.* at 1139. The court reasoned that because the default sanction may only be used against parties within the personal jurisdiction of the court, a district court may not use its power to impose sanctions under rule 37 to declare a waiver of the procedural prerequisites to the exercise of its jurisdiction. *Id. But see* United States v. UMW, 330 U.S. at 293 (courts have jurisdiction to determine jurisdiction); Note, *supra* note 49, at 928-29 (courts must have power to compel production of facts necessary to make determination of jurisdiction).

[56] 635 F.2d 434 (5th Cir. 1981).

[57] *Id.* at 436; *see* FED. R. CIV. P. 37(b)(2)(C) (permitting parts of a party's pleadings to be stricken for failure to comply with discovery order).

[58] 635 F.2d at 436.

[59] The Court relied on the test for personal jurisdiction found in *International Shoe Corp. v. Washington,* 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)), which requires that "the maintenance of the suit . . . does not offend 'tradi-

rious reasons, a defendant may be estopped from raising the issue,[61] the actions of a defendant may amount to a submission to the jurisdiction of the court.[62] Further, due process would be violated only if the behavior of a defendant would not support the *Hammond Packing* presumption.[63] Since a proper application of rule 37(b)(2)(A) will, as a matter of law, support such a presumption,[64] if no abuse of discretion in the trial court's application of the rule 37 sanction is found, the sanction would be nothing more than the invocation of a legal presumption.[65] The Court concluded that the trial court's invocation of powers under rule 37 was clearly appropriate; because of defendants' continuing delay and obvious disregard of the court's orders[66] and because plaintiff's allegation that the court had personal jurisdiction over defendants was not a frivolous claim,[67] rule 37(b)(2) was properly ap-

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tional notions of fair play and substantial justice.' " 102 S. Ct. at 2104-05.

The Court observed that "minimum contacts" were still a constitutional requirement; however, under rule 37(b)(2)(A) these "minimum contacts" may be taken as established after noncompliance with discovery orders. 102 S. Ct. at 2104-05 n.10.

[60] 102 S. Ct. at 2105. The Court reasoned that the personal jurisdiction requirement protects an individual liberty interest and may therefore be waived. *Id.; see supra* notes 43, 51.

[61] 102 S. Ct. at 2105. The failure to obey certain procedural rules may result in a restriction of the exercise of legal rights. For example, under FED. R. CIV. P. 12(h)(1), the failure to enter a timely objection to personal jurisdiction results in a waiver of the objection. A rule 37(b)(2)(A) sanction when personal jurisdiction is established has the same effect. 102 S. Ct. 2105-06; *see supra* note 51.

[62] 102 S. Ct. at 2105. The Court concluded that plaintiff's demonstration of certain facts is not the only way in which personal jurisdiction may arise. *Id.*

[63] *Id.* at 2106. The Court rationalized that the due process limits of rule 37(b)(2)(A) embody the standard established in *Hammond Packing*, 212 U.S. at 351, that "[t]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." 102 S. Ct. at 2106.

In *Hammond Packing*, the Court held that due process was not violated when a default judgment was rendered after a defendant had failed to comply with a pretrial discovery order. *See supra* notes 15-19 and accompanying text. This rule was permissible as an expression of "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause." 212 U.S. at 350-51.

[64] 102 S. Ct. at 2106.

[65] *Id.; see supra* note 63.

[66] 102 S. Ct. at 2102. The initial discovery request was made in August, 1976. Despite several orders from the court to produce the requested material, the defendants had not complied by December, 1978. *Id.*

[67] *Id.* The Court noted that the district court found, as an alternative ground for its jurisdiction, that defendants had sufficient contacts with Pennsylvania to fall within the

plied to support the finding of personal jurisdiction.[68]

Justice Powell, concurring, noted that the federal district courts, as courts of limited jurisdiction, possess no warrant to create jurisdictional law of their own.[69] Since the governing jurisdictional statute remains the long-arm statute of the state of Pennsylvania,[70] the due process question in this case was whether minimum contacts existed between defendants and the forum state sufficient to justify the state's exercise of personal jurisdiction.[71] Justice Powell further observed that the plaintiff's jurisdictional assertions were sufficient to establish a prima facie showing of minimum contacts.[72] Because defendants failed to comply with jurisdictional discovery orders after the prima facie showing,[73] the prima facie showing should be the standard required to sustain the Court's finding that minimum contacts existed.[74]

The Supreme Court in the instant case applied guidelines for the application of discovery sanctions specified in previous cases to the jurisdictional discovery context and concluded that a proper application of rule 37(b)(2)(A) was not a due process violation.[75] Thus, the previous reluctance of some courts to impose stringent sanctions in situations involving discovery abuse,[76] as evidenced by the lower court interpretations of the discretionary stance of *Societe Internationale*[77] and the deterrent aspect of *National Hockey League*,[78] should now be

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State's long-arm statute. *Id.* at 2103; *see supra* note 10.

[68] 102 S. Ct. at 2107-08.

[69] *Id.* at 2109. Justice Powell reasoned that under the Rules of Decision Act, 28 U.S.C. § 1652, district courts must apply state law "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide . . . ." Therefore, in diversity cases, the personal jurisdiction of the district courts is determined by the law of the forum state in the absence of a federal statute establishing a basis for personal jurisdiction. 102 S. Ct. at 2109.

[70] 102 S. Ct. at 2109.

[71] *Id.* at 2110. Justice Powell cautioned that without a showing of "minimum contacts," a finding of personal jurisdiction would transgress established constitutional limitations. By finding that "minimum contacts" are not required prior to the exercise of jurisdiction to impose sanctions under rule 37, he reasoned that the Court is saying that "minimum contacts" are no longer a constitutional requirement for the exercise of personal jurisdiction over an unconsenting defendant. *Id.*

[72] *Id.* at 2111.

[73] *Id.* at 2102-03.

[74] *Id.* at 2111. Justice Powell emphasized that in this case the facts alone were sufficient to establish that the court had personal jurisdiction to impose rule 37 sanctions.

[75] 102 S. Ct. at 2107.

[76] *See supra* note 41 and accompanying text.

[77] *See supra* note 32.

[78] *See supra* note 40 and accompanying text.

dispelled. *Insurance Corp. of Ireland* should remove whatever hesitation district courts have had toward imposing rule 37(b) sanctions in the jurisdictional discovery context because the threat of reversal on the grounds of due process violations has been effectively eliminated. This should result in greater compliance with jurisdictional discovery orders in that the potentially favorable results of disclosure are far more appealing than the detriment of a rule 37(b) sanction.[79]

If courts were not to employ rule 37(b) sanctions to enforce jurisdictional discovery, defendants could simply avoid litigation by raising jurisdictional objections and then refusing to comply with requests for jurisdictional information necessary to determine the validity of the objection. A defendant's refusal to support an allegation of lack of personal jurisdiction by production of all relevant information strongly suggests that the information withheld is damaging to his case. In embracing the *Hammond Packing* presumption and employing it in the instant case, the Court effectively treated certain facts as being established,[80] and thus allowed the discovery sanction to remedy a specific prejudice caused to plaintiff by defendant's noncompliance. Therefore, in accordance with the requirements of due process,[81] the means employed were no more severe than reasonably necessary to achieve the purpose of the sanction.

In many cases, plaintiff's only method of establishing personal jurisdiction is through discovery. To prevent the exercise of this process would be to deny him a forum in which to vent his grievance. The utilization of rule 37(b) sanctions as a means of establishing jurisdictional facts is a judicially fair and effective method of remedying the potential abuse by defendants of the discovery rules without defeating the fundamental goal of the judicial process: to provide for a fair hearing on the merits of every action.

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[79] It is possible that the results of such a disclosure will prove favorable to the party against whom discovery is sought.

[80] 102 S.Ct. at 2103.

[81] *See supra* note 63 and accompanying text.

Property—Landlord and Tenant—Exculpatory Clause in Residential Lease Absolving Lessor of Tort Liability for Common Areas Is Void as Against Public Policy

Plaintiff[1] sued her landlord in the Circuit Court of Warren County, seeking damages[2] for the alleged negligence of the landlord in maintaining a common stairwell[3] on which the plaintiff was injured in a fall. The defendant landlord had sought immunity against tort liability by including an exculpatory provision in the lease.[4] The trial judge refused to admit the lease into evidence, holding that exculpatory provisions in residential leases are void as against public policy.[5] On appeal, the Mississippi Supreme Court, *held*, affirmed. An exculpatory provision placed in a residential lease by a lessor seeking immunity against liability for negligent maintenance of a common area is void as against public policy. *Cappaert v. Junker*, 413 So. 2d 378 (Miss. 1982).

Historically, a lease was a device the lessor used as security against the indebtedness of the lessee, but by 1500 the concept of a lease as a conveyance had been firmly established.[6] The modern lease, in con-

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[1] The plaintiff, DeEtte Junker, was a tenant in the Pecan Ridge Apartment complex in Vicksburg, Mississippi. Cappaert v. Junker, 413 So. 2d 378, 379 (Miss. 1982).

[2] The plaintiff recovered a $20,000 judgment against the defendant in the circuit court. *Id.* at 378-79.

[3] The plaintiff's apartment was upstairs; she and the tenants in two other apartments used a common stairway for access to their apartments. *Id.* at 379.

[4] The lease contained the following exculpatory provision:

> The lessor shall not be liable to Lessee, or to Lessee's employees, patrons and visitors, or to any other person for any damage to person or property caused by any act, omission or neglect of Lessor or any other tenant of said demised premises, and Lessee agrees to hold Lessor harmless from all claims for any such damage, whether the injury occurs on or off the leased premises.
>
> Lessee assumes responsibility for the condition of the premises. Lessor will not be responsible for damage caused by leaks in the roof, by bursting of pipes by freezing or otherwise, or any vices or defects of the leased property, or the consequences thereof, except in case of positive neglect or failure to take action toward the remedying of such defects within reasonable time after having received written notice from Lessee of such defects and the damage caused thereby. Should Lessee fail to promptly so notify Lessor, in writing, of any such defects, Lessee will become responsible for any damage resulting to Lessor or other parties.

Id.

[5] *Id.*

[6] 2 R. Powell, The Law of Real Property ¶ 221[1] (1981).

trast, is recognized as being both a conveyance and a contract.[7] Because the development of the law regarding leases preceded the concept of dependent covenants[8] by at least a century,[9] provisions in leases historically were treated as being independent of one another.[10]

Quite in keeping with the common law view of lease covenants was the notion that a lease was a conveyance of an estate or interest in real

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[7] C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 69 (1962). The Mississippi Supreme Court has defined a lease as a conveyance or transfer of property, but has shown a willingness to incorporate rules of contract construction in the interpretation of leases. *See, e.g.*, Hurst v. English, 357 So. 2d 132, 134 (Miss. 1978) (lease is a conveyance of property for a specified period); Standard Fruit & S.S. Co. v. Putnam, 290 So. 2d 612, 615 (Miss. 1974) (same); Hines Motor Co. v. Hederman, 201 Miss. 859, 867, 30 So. 2d 70, 72 (1947) (applying contract maxim, lease to be viewed as a whole); Copiah Hardware Co. v. Johnson, 123 Miss. 624, 634, 86 So. 369, 369 (1920) (same). *See generally* Note, *Contract Principles and Leases of Realty*, 50 B.U.L. REV. 24, 24-29 (1970) (both property and contract principles applicable to leases).

[8] When one's obligation to perform is considered dependent upon the performance of another, the aggrieved party can curtail his own performance and abrogate the agreement the moment a breach occurs. A. CORBIN, CORBIN ON CONTRACTS §§ 633, 637 (1952).

[9] 1 M. FRIEDMAN, FRIEDMAN ON LEASES § 1.1, at 3 (1978). But for the separate evolution of leases and bilateral contracts, the legal character of a lease would probably be much different today. *Id.*

[10] *See* C. MOYNIHAN, *supra* note 7, at 70; 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1292 (3d ed. 1972). Implicit in the concept of independent covenants is the idea that the breach of a covenant by one party in no way excuses the obligation of the non-breaching party to abide by his own covenants. *See* 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952); Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 383 (1970).

In Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the court introduced the contract principle of mutually dependent covenants to the landlord-tenant arena. 428 F.2d at 1082. Specifically, the *Javins* court held that District of Columbia landlords implicitly warrant to their tenants that the landlords will maintain the leased premises in a habitable condition during the term of the lease. The standard of liability was measured by the Housing Regulations of the District of Columbia. 428 F.2d at 1071.

At least one commentator has pointed out that, absent a statewide housing code, espousal of the *Javins* implied warranty of habitability doctrine might result in a "disunity of application based upon locality." Note, *Javins v. First Nat'l Realty Corp.: Should We Follow the Leader?*, 42 MISS. L.J. 523, 532 (1971). Despite the potential problems of applying the *Javins* rule, at least 36 other jurisdictions have adopted the implied warranty of habitability. Comment, *In Search of a Habitable Home in Mississippi*, 49 MISS. L.J. 881, 887 n.48 (1978). For a more detailed discussion of the origin and development of the implied warranty of habitability, see Jaeger, *Apartments and Houses: The Warranty of Habitability*, 12 AKRON L. REV. 373 (1979); Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444 (1974).

property for a specified length of time.[11] As the definition suggested, the landlord was said to have fully discharged his obligation by merely signing the lease over to the lessee;[12] hence, the basic premise underlying the landlord-tenant relationship: the doctrine of caveat emptor or, more appropriately, "caveat lessee."[13] As applied to the landlord-tenant relationship, this doctrine meant that, absent fraud[14] or an express

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[11] *See* 2 R. POWELL, *supra* note 6, ¶ 221[1], at 179-81. Late in the 12th century a tenant was considered to have no interest in the land, but he did have the benefit of a contract. *Id.* at 179. Due in part to judicial recognition of tenant protest over the conversion of arable land into sheep pastures, the legal pendulum took a drastic swing in the time span of three centuries. By the year 1500 the lease not only vested an interest in land in the lessee, but was also asserted to be a coveyance rather than a contract. *Id.* "The modern law is the synthesis of these two historical [tides]." *Id.* at 181. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 63 n.5 (4th ed. 1971) (authorities supplying modern definition of lease).

[12] *See* 1 M. FRIEDMAN, *supra* note 9, at 5 (ancient farm lease was essentially of land with the house being merely incidental). Because leases historically have been of land, the theory of a lease as a conveyance, with the landlord obliged only to sign the lease, seemed logical. The landlord's right of entry upon the land was negligible, and therefore the tenant took responsibility for the upkeep of the premises. *Id.* The modern urban lease, by comparison, is typically not of land but of space in a building. This arrangement "contemplates a continuous flow of services from landlord to tenant, e.g., heat, light, cooling, elevator service, cleaning, removal of waste, as well as access through space not under the tenant's control." *Id.* For a case recognizing the differences between the tenant at common law and his modern day counterpart, see Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078-79 (D.C. Cir.), *cert. denied* 400 U.S. 925 (1970).

[13] *See* Hamilton, *The Ancient Maxim Caveat Emptor,* 40 YALE L.J. 1133, 1135 (1931). A number of jurisdictions have enacted statutes nullifying the rule of caveat emptor with respect to residential leases. *See* RESTATEMENT (SECOND) OF PROPERTY § 5, at 150-52 (1976) (compilation of statutes).

[14] *See* W. PROSSER, *supra* note 11, at 401 (fraud exception to landlord tort immunity). One exception to caveat emptor that developed early in the common law provided that the lessor was under an obligation to disclose to the lessee concealed dangerous conditions existing at the time possession was transferred. According to Prosser, "There is 'something like fraud' in a failure to give warning of a known hidden danger to one who enters upon the assumption that it does not exist." *Id.* Because this exception was rooted in fraud, nothing short of the landlord's actual knowledge of the hidden defect, coupled with his failure to warn the tenant, would suffice to create liability. *See* Comment, *Tort Liability of the Landlord: The Emergence of the Reasonable Man Standard,* 23 EMORY L.J. 1051, 1056 (1974).

The Mississippi Supreme Court recognized this exception in Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 78 So. 2d 743 (1955), by stating: "[a] landlord's breach of his [general] covenant to repair . . . does not render him liable . . . *unless* . . . the premises contained, to the landlord's knowledge, dangerous hidden defects unknown to or concealed from the tenant, which the tenant could not have discovered by a reasonable inspection." *Id.* at 645, 78 So. 2d at 749 (emphasis added). For further treatment of the "concealment of hidden defects" exception to caveat emptor, see Faber v. Creswick, 31 N.J. 234, 156 A.2d 252, 254-56 (1959); Eldredge, *Landlord's Tort Liability for Disre-*

provision in the lease,[15] the landlord had absolutely no obligation to repair or maintain the leased premises.[16] Further, because the landlord was under no legal duty to care for the premises during the term of the lease, he was not liable to the tenant or to the tenant's invitees for injuries caused by the defective condition of the premises.[17] In 1893,

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pair, 84 U. PA. L. REV. 467 (1936); Harkrider, *Tort Liability of a Landlord*, 26 MICH. L. REV. 260 (1927).

[15] *See* 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1230, at 126 (repl. 1981) (no implied warranty in leases). Many lease agreements contain a covenant or promise by the landlord to keep the leased premises in good repair. *Id.* § 1232. As the following discussion indicates, the legal consequences of such a covenant in Mississippi depend primarily upon whether the nature of the landlord's transgression was misfeasance (negligent repair) or nonfeasance (failure to repair).

The Mississippi Supreme Court first dealt with the effect of a landlord's misfeasance in Green v. Long, 152 Miss. 117, 118 So. 705 (1928). Although the lease in *Green* contained no covenant to repair, the lessor gratuitously repaired the leaky roof upon being notified. As a result of the lessor's faulty repairs, the tenant's merchandise was damaged. *Id.* at 118, 118 So. at 705-06. The court imposed liability on the lessor for his negligence. *Id.*, 118 So. at 706. Two years later, in Marsh v. Serio, 156 Miss. 371, 126 So. 46 (1930), the Mississippi Supreme Court clarified its ruling in *Green* by holding that a lessor's liability extended only to property damage that was the proximate result of the negligent repairs, and not to damage attributable to the original defective condition. *Id.* at 377, 126 So. at 48. The lessee in *Marsh* was unable to recover because he failed to show that the alleged damage was proximately caused by the negligent repair job. *Id.*, 126 So. at 48.

Mississippi made clear its position on nonfeasance in Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 78 So. 2d 743 (1955). In that case, the court held that only the breach of an obligation to make specific repairs, as opposed to an agreement to make general repairs, would give the lessee a cause of action. *Id.* at 645, 78 So. 2d at 749. The lease in *Ford* contained the following clause: "Minor surface repairs within space demised exclusively to lessee to be done by lessee; other repairs and changes, as required, to be done by lessor. Landlord shall make whatever structual changes, structural repairs, or repairs of structural defects as may be required." *Id.* at 637-38, 78 So. 2d at 745. Construing this as a general repair covenant, the court found the landlord not liable for the lessee's personal injuries. *Id.* at 645-46, 78 So. 2d at 749; *see also* Arledge v. Gulf Oil Corp., 578 F.2d 130, 131-32 (5th Cir. 1978) (federal court interpretation of Mississippi cases on landlord tort liability); Floyd v. Lusk, 190 So. 2d 451, 452 (Miss. 1966) (no lessor tort liability absent specific repair covenant or proof of willful negligence or fraud); Wolff v. Mauceli, 237 Miss. 378, 384, 114 So. 2d 845, 848 (1959) (actual or constructive notice of needed repairs is prerequisite to liability on specific repair covenant); Biloxi Realty Corp. v. Bittar, 227 Miss. 227, 230, 86 So. 2d 14, 14 (1956) (lessee compensated for property damage proximately caused by lessor's breach of specific repair covenant).

[16] 3A G. THOMPSON, *supra* note 15, § 1230, at 132, 134; *see* McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 359, 176 So. 395, 396 (1937).

[17] The New York Court of Appeals observed in an 1874 decision:

> There is no reason for holding the lessor, in the absence of any agreement or fraud, liable to the tenant for the present or future condition of the premises, that would not be equally applicable to a similar liability sought to be imposed by a grantee in fee upon his grantor.

the Mississippi Supreme Court, in the often-cited case of *Jones v. Millsaps*,[18] judicially recognized the caveat emptor doctrine[19] and affirmed the absence of an implied warranty of fitness in the state's landlord-tenant law.[20]

Since the formulation of the caveat emptor doctrine, the structure of western society has changed radically. Of particular significance has been the phenomenon of urban growth[21] and, attendant to that, the advent of multi-unit housing.[22] In response to these changes, courts developed the "common area" exception to the caveat emptor doctrine.[23]

Jaffe v. Harteau, 56 N.Y. 398, 401 (1874).

[18] 71 Miss. 10, 14 So. 440 (1893). In *Jones*, the landlord, who had retained control of the upper portion of the leased building, neglected to repair the deteriorated roof. Heavy rains caused the roof to leak, resulting in damage to the tenant's goods stored in the leased premises below. *Id.* at 10-11, 14 So. at 440.

[19] The *Jones* court, in discussing the doctrine of caveat emptor, stated:

> The general rule is firmly established that no implied covenant for repairs can be raised against the lessor. The lessee cannot invoke an implied covenant of the landlord that the leased premises are fit and suitable for the lessee's business or use. The intending tenant must use his own faculties, and judge for himself if the premises he desires to lease are in repair and are suitable for his use. If he wishes to protect himself against the hazards of subsequently occurring accidents or defects requiring repairs, he must do so by proper covenants in his contract of lease. *He takes his leased premises for better or for worse,* as an ancient authority aptly characterizes his taking.

Id. at 18, 14 So. at 441 (emphasis added).

[20] *Id.*, 14 So. at 441. This view has consistently been applied in Mississippi both to commercial and to residential leases. *See, e.g.*, Foster v. United States, 214 F. Supp. 181, 183 (S.D. Miss. 1963) (commercial lease); Loflin v. Thornton, 394 So. 2d 905, 906 (Miss. 1981) (residential lease); Wilbourn v. Hardin, 234 So. 2d 606, 608 (Miss. 1970) (lessee examined property before signing lease); Causey v. Norwood, 170 Miss. 874, 879-80, 156 So. 592, 593 (1934) (state committed to common law doctrine). Mississippi is one of the few remaining states that has not incorporated the implied warranty of fitness. *See supra* notes 9 and 12.

[21] *See* Simmons v. Columbus Venetian Stevens Bldgs., 20 Ill. App. 2d 1, 155 N.E.2d 372, 384 (1959). The *Simmons* court pointed out that the majority of pacesetting judicial and legislative action in this field has come from jurisdictions containing large urban areas. 155 N.E.2d at 384. The court noted that rental housing in rural communities is "more apt to be small houses where the lessee shares no common premises and the lessor has no control of the property." *Id.*

[22] *See generally* 2 M. FRIEDMAN, *supra* note 9, § 10.103a, at 398-99 (societal changes since adoption of caveat emptor). Friedman explains that the common law view of a lease was easily applied when the lease was of an entire property. The landlord had no right to enter the land without the tenant's permission; accordingly, he had no obligation to keep the premises in fit condition. *Id.* at 399. By comparison, the modern urban lease is usually only for part of the building where the lessee resides. The lessee and other tenants must share entrances, corridors, stairs, utility lines, and other facilities. *Id.*

[23] Modern lessors are generally not liable for defective conditions on the leased

This exception provides that a landlord's obligation with respect to common areas is to exercise reasonable care to maintain them in a safe condition.[24]

This principle was first enunciated by the Mississippi Supreme Court in *Hiller v. Wiley*,[25] in which a tenant in a duplex sued the landlord for injuries incurred on a negligently maintained flight of stairs used by both tenants.[26] The court held that because the landlord retained control over the stairs, he should bear the responsibility for their upkeep.[27] Later, in *Turnipseed v. McGee*,[28] the Mississippi Supreme Court ruled that the common area exception applied to the roof of a multi-unit apartment building.[29] The court also clarified its decision in *Hiller* by holding that before the common area exception can be

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premises during the term of the lease, although an exception has been established for so-called "common areas." W. PROSSER, *supra* note 11, § 63, at 405-06. For instance, when an apartment or office building is leased to several different tenants, these tenants generally assume possession of and control over the leased premises. An exception arises, however, in regard to the approaches and common passageways, which remain in the possession and in the control of the landlord. As Prosser explains, "The tenants are permitted to make use of [such areas] but do not occupy them, and the responsibility for their condition remains upon the lessor . . . [who is] under an *affirmative obligation* to exercise reasonable care to inspect and repair such parts of the premises . . . ." *Id.* (emphasis added).

[24] *See, e.g.*, Nydegger-Friedman Realty Corp. v. Sweeny, 271 F.2d 954, 955 (4th Cir. 1959) (parking lot of shopping center deemed common area); McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093, 1095 (1971). *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 27.17 (1956) (injuries on premises under lessor's control); W. PROSSER, *supra* note 11, § 63, at 406 n.79 (collecting authorities dealing with common area exception).

[25] 192 Miss. 488, 6 So. 2d 317 (1942).

[26] *Id.*

[27] *Id.* The court summarized the common area exception:

> [T]he property occupied by the appellee as a tenant was a double house; that is, part thereof was leased to another tenant; but there was a common approach, and a single set of front steps available for use by all tenants and by the landlord. Under these circumstances it is clear that the landlord, not only for convenience but of necessity, retained control over, and hence responsibility for the reasonable upkeep of, the steps, and is liable for a failure to use reasonable care to keep them reasonably safe.

Id.

[28] 236 Miss. 159, 109 So. 2d 551 (1959). The plaintiff-tenant sued the lessor for personal injuries received when a scuttle-hole cover blew off the roof of the apartment building during a storm and struck the plaintiff. *Id.* at 163, 109 So. 2d at 552.

[29] *Id.* at 167, 109 So. 2d at 554. For judicial treatment of other common areas, see Kopera v. Moschella, 400 F. Supp. 131, 135 (S.D. Miss. 1975) (swimming pool in apartment complex); Manns v. Stein, 99 Ill. App. 2d 398, 241 N.E.2d 691, 692 (1968) (porch); Underhill v. Shactman, 337 Mass. 730, 151 N.E.2d 287, 289 (1958) (parking areas).

invoked the plaintiff must show that the landlord had actual or constructive notice of the defect and a sufficient opportunity to repair it.[30]

Faced with a widening scope of tort liability,[31] landlords sought refuge under exculpatory provisions akin to those historically found in common carrier situations.[32] The main function of an exculpatory clause in a lease is to insulate the lessor from liability for property damage or for personal injury attributable to the condition of the leased premises.[33] While many courts continue to uphold exculpatory clauses in the abstract,[34] urbanization and its offspring[35] have caused an increasing number of courts to employ various means to avoid enforcement of these clauses.[36] In several instances, these courts have

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[30] 236 Miss. at 167, 109 So. 2d at 554 (citing 32 AM. JUR. *Landlord and Tenant* § 744 (1938)).

[31] For a synopsis of the general scope of lessor tort liability, see 2 F. HARPER & F. JAMES, *supra* note 24, § 27.16; W. PROSSER, *supra* note 11, § 63, at 400-12; RESTATEMENT (SECOND) OF TORTS §§ 357-61 (1965).

In Sargent v. Ross, 113 N.H. 388, 308 A.2d 528, 532 (1973), the Supreme Court of New Hampshire eliminated the requirement that the injured party fit his claim within one of the traditionally recognized exceptions to lessor immunity. The *Sargent* court abolished the lessor's general tort immunity primarily due to (1) the difficulty it had in fitting the facts of the case into one of the traditional exceptions to landlord immunity, and (2) the lack of remaining social justifications for landlord immunity. *Id.* at 532-34. The court held that landlords must exercise reasonable care not to subject others to an unreasonable risk of harm. *Id.* at 534.

Other courts have embraced the *Sargent* rationale that possession and degree of control, which have traditionally been the foundation of the exceptions to lessor immunity, are merely factors considered in the determination of negligence. *See, e.g.*, Brennan v. Cockrell Inv., Inc., 35 Cal. App. 3d 796, 111 Cal. Rptr. 122, 125 (1973).

[32] In the common carrier context, Mississippi has voided exculpatory provisions as being contrary to public policy. *See, e.g.*, Gulf & S.I.R. v. Sullivan, 155 Miss. 1, 11, 119 So. 501, 503 (1928) (clause void as applied to wanton acts); Yazoo & M.V.R.R. v. Grant, 86 Miss. 565, 570, 38 So. 502, 504 (1905) (common carrier cannot contractually exempt itself from negligence); Illinois Cent. R.R. v. Crudup, 63 Miss. 291, 302 (1885).

[33] 2 R. POWELL, *supra* note 6, ¶ 234[4].

[34] Many courts uphold exculpatory clauses, but with qualifications. *See, e.g.*, Baker v. Wheeler, Lacey & Brown, Inc., 272 Ala. 101, 128 So. 2d 721, 724-25 (1961) (exculpatory clause valid as applied to passive negligence); Kulman v. Sulcer, 99 Ga. App. 28, 107 S.E.2d 674, 679 (1959) (exculpatory clause valid as to simple negligence, but not as to willful, reckless acts); Moss v. Hunding, 27 Ill. App. 2d 189, 169 N.E.2d 396, 399 (1960) (exculpatory clause invalid as to tenant injured in another tenant's apartment); O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. App. 2d 349, 146 N.E.2d 198, 201 (1957) (exculpatory clause valid if fairly entered into), *aff'd*, 15 Ill. 2d 436, 155 N.E.2d 545 (1959). For a discussion of judicial treatment of exculpatory clauses in various contexts, see 15 S. WILLISTON, *supra* note 10, §§ 1750-1751B.

[35] *See supra* notes 21-22 and accompanying text.

[36] *See supra* note 31. In McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971), the Washington Supreme Court developed a cogent basis for voiding

been aided in their efforts by legislation.[37] Absent legislative backing, however, courts have carefully refrained from categorizing the grounds upon which they have voided exculpatory clauses,[38] but seemingly have been persuaded to negate the provisions by the confluence of two factors: (1) the inequality of bargaining strength between the parties,[39] and (2) the existence of "some social relationship between the parties that would render the contracts unconscionable."[40]

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an exculpatory clause as it applied to a common area accident. 486 P.2d at 1097. The court stated:

> When a lessor is no longer liable for the failure to observe standards of affirmative conduct, or for *any* conduct amounting to negligence, by virtue of an exculpatory clause in a lease, *the standard ceases to exist*. In short, such a clause *destroys* the concept of negligence in the landlord-tenant relationship.

Id. at 1096.

[37] *See* DEL. CODE ANN. tit. 25, § 5515 (1974) (applicable to both personal injury and property damage); GA. CODE § 61-102 (Supp. 1979) (invalidates clauses with respect to both landlord and tenant); ILL. ANN. STAT. ch. 80, ¶ 91 (Smith-Hurd Supp. 1981) (same); MD. REAL PROP. CODE ANN. § 8-105 (1981) (residential lease exculpatory clauses void); MASS. GEN. LAWS ANN. ch. 186, § 15 (West 1977) (applied especially to common areas); N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1978) (lessor exculpatory clauses void). Mississippi's only legislative pronouncement on the subject of exculpatory clauses occurred in 1972 when the state legislature passed a law making such clauses in construction contracts void. Act of Apr. 27, 1972, ch. 400, 1972 Miss. Laws 457 (codified at MISS. CODE ANN. § 31-5-41 (Supp. 1982)).

[38] *See* Simmons v. Columbus Venetian Stevens Bldgs., 20 Ill. App. 2d 1, 155 N.E.2d 372, 384 (1959). The *Simmons* court noted that because many factors must be considered, any attempt to classify the various bases upon which exculpatory clauses have been voided would be very difficult. 155 N.E.2d at 384.

[39] In Crowell v. Housing Auth., 495 S.W.2d 887 (Tex. 1973), the court stated: "If the contract is between private persons who bargain from positions of substantially equal strength, the agreement is ordinarily enforced by the courts." *Id.* at 889. The court in Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971), held that equal bargaining power included entering into the exculpatory agreement knowingly and willingly. 276 N.E.2d at 148. The court reasoned that because the lessee possessed only one and a half years of high school education, and because the lessor's agent neglected to explain or even point out the exculpatory provision, the clause was void. *Id.* at 145-48. *See generally* Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COLUM. L. REV. 248, 248-49 (1937) (exculpation rarely allowed when bargaining strength unequal).

[40] Simmons v. Columbus Venetian Stevens Bldgs., 20 Ill. App. 2d 1, 155 N.E.2d 372, 384 (1959).

Some writers have included contravention of public policy as a third distinct basis for voiding exculpatory clauses. *See* 50 MISS. L.J. 921, 932 (1979). To do so, however, is to disregard that the factors enumerated in *Simmons* are merely pieces in the public policy puzzle that the courts must assemble. *See, e.g.*, Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 445-46, 32 Cal. Rptr. 33, 37-38 (1963) (identifying six factors considered in determining whether agreement contravenes public policy). *See generally*

Illinois Central Railroad v. Harris,[41] a 1914 Mississippi decision, illustrates the operation of these two factors.[42] The defendant railroad in *Harris* had made it a prerequisite to employment that the applicant sign a contract that released the company from every conceivable act of negligence.[43] The court held that this exculpatory clause was void as contrary to public policy.[44]

Following the *Harris* decision, however, the Mississippi Supreme Court displayed hesitation in its willingness to use public policy contravention as a basis for holding exculpatory clauses void. In *State ex rel. Knox v. Hines Lumber Co.*,[45] the court set forth parameters on its power to invalidate contracts on public policy grounds by holding that judicial action was improper unless the contract was either prohibited by the state constitution or by statute, or condemned by some judicial decision.[46]

Some courts, wary of trespassing onto legislative ground, have placed more precise constraints on their power to make policy declarations. For example, in *Tunkl v. Regents of the University of California*,[47] the California Supreme Court mentioned six specific criteria that could be used to identify agreements containing exculpatory clauses that are contrary to public policy.[48]

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44 WASH. L. REV. 498, 499-504 (1969) (more needed to void clause than mere assertion of public policy frustration). At least two jurisdictions have indicated that the legislature should determine whether exculpatory clauses are void as against public policy. *See* O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. App. 2d 436, 155 N.E.2d 545, 547 (1959); Manius v. Housing Auth., 350 Pa. 512, 39 A.2d 614, 615-16 (1944).

[41] 108 Miss. 574, 67 So. 54 (1914).

[42] *See id.* at 579, 67 So. at 56. The court alluded to not only the social nature of the relationship between a railroad and its employees, but also the inequality of bargaining power inherent in that relationship.

[43] *Id.* at 578, 67 So. at 56.

[44] *Id.* at 579, 67 So. at 56.

[45] 150 Miss. 1, 115 So. 598 (1928).

[46] *Id.* at 48, 115 So. at 605. The court stated, "The power to invalidate contracts or agreements on the ground that they violate public policy is far reaching and easily abused." *Id.*

[47] 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

[48] 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38. The criteria specified by the California Supreme Court in *Tunkl* were: (1) that the agreement involve a business suitable to government regulation; (2) that the party seeking exculpation be performing an important public service, of practical necessity to some; (3) that the party seeking exculpation represent himself as willing to perform the service for whomever wants it; (4) that the party seeking exculpation hold a decisive edge in bargaining strength against the public generally; (5) that the contract used by this party be of the standardized adhesion variety; and (6) that because of the transaction, the person or property of the purchaser be placed under the control of the seller, and thus be subject to the seller's carelessness. *Id.*

The Mississippi Supreme Court first evaluated the validity of an exculpatory provision in a lease in *Smith v. Smith*.[49] There, the lessee under a commercial lease sought compensation for property damage attributable to a leaky roof.[50] The court completely disregarded a covenant in the lease to repair specific areas,[51] including the defective roof, and held that because the contract was unaffected by any public interest and untainted by any evidence of unequal bargaining power, the exculpatory clause was valid.[52]

In a dissenting opinion, Justice Sugg[53] noted that the specific repair covenant conflicted with the exculpatory clause.[54] In an effort to resolve the inconsistency, Justice Sugg advocated applying a basic rule of construction, which states that all provisions of a contract must, if possible, be given effect.[55] He argued that the goal of this rule could be effectuated by construing the exculpatory clause to be valid except as applied to the roof.[56]

In one subsequent California case, Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 512, 573 P.2d 465, 143 Cal. Rptr. 247 (1978), the six-part *Tunkl* test was applied to a private residential lease. As to the pivotal fourth criterion, inequality of bargaining strength, the court noted, "In a state and local market characterized by a severe shortage of low-cost housing, tenants are likely to be in a poor position to bargain with landlords." 573 P.2d at 469, 143 Cal. Rptr. at 251.

[49] 375 So. 2d 1041 (Miss. 1979). The case was filed in the Circuit Court of Lincoln County. *Id.* at 1042.

[50] *Id.*

[51] The lease agreement stated: "Lessors shall maintain and keep in a tenantable condition *the roofing* and foundation of the building located on the hereinabove described premises and the exterior walls." *Id.* (emphasis added). For a discussion of the significance of distinguishing between a general and specific repair covenant, see *supra* note 15 and accompanying text.

[52] 375 So. 2d at 1043.

[53] Justices Robertson and Bowling joined in the dissent. *Id.*

[54] *Id.* In one section of the lease, the landlord expressly promised to keep the roof in good condition. *See supra* note 51. In another clause the tenant agreed, via the exculpatory provision, to "save harmless and idemnify the landlord from all losses, damages, liabilities and expenses for any damage to persons or property sustained in or about the demised premises." 375 So. 2d at 1043.

[55] 375 So. 2d at 1043. For other Mississippi cases in which contracts were construed as a whole, see Yazoo & M.V.R.R. v. First Nat'l Bank, 119 Miss. 59, 64, 80 So. 382, 383 (1918) (construction contract); Harris v. Townsend, 101 Miss. 590, 596, 58 So. 529, 529 (1912) (promissory note); *see also* Hines Motor Co. v. Hederman, 201 Miss. 859, 867, 30 So. 2d 70, 72 (1947) (applying this contract principle to commercial lease); Copiah Hardware Co. v. Johnson, 123 Miss. 624, 634, 86 So. 369, 369 (1920) (same).

[56] 375 So. 2d at 1043. Justice Sugg discussed two non-Mississippi cases that held that covenants to repair will support an action for damages resulting from their breach, notwithstanding adjoining exculpatory provisions. *See* Kelley Realty Co. v. Botsford, 201 Ala. 506, 78 So. 860, 861 (1918) (necessary to construe lease in its entirety); Gilson v.

In the instant case, the Mississippi Supreme Court determined that it had the authority to make a public policy determination of the validity of the exculpatory clause at issue, because similar clauses had already been construed in Mississippi's common carrier cases as contravening public policy.[57] Adopting the rationale of a leading case on this issue from another jurisdiction,[58] the court noted that because the tenant community had grown dramatically over the past few decades, and because contracts entered into between tenants and their landlords were therefore no longer unique, isolated transactions, any judicial decision on point would necessarily affect not only the litigants involved but all landlords and tenants.[59] The court reasoned, in attempting to formulate a general rule, that because the lessor had an affirmative duty at common law regarding common areas,[60] judicially sanctioned abrogation of this duty via exculpatory clauses would effectively destroy the common law rule.[61] Because the abrogation of a lessor's common law duty toward common areas would clearly offend the public policy of the state, exculpatory clauses having this effect will not be enforced by the courts.[62]

Because the bulk of pace-setting landlord-tenant law has emanated from jurisdictions containing large urban areas,[63] it is hardly surprising that the Mississippi Supreme Court, sitting in a state that is primarily rural, has adopted a traditionalist stance in its treatment of

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Gillia, 45 Tenn. App. 193, 321 S.W.2d 855, 863 (1958) (same).

[57] 413 So. 2d at 380-81; *see supra* note 32 and accompanying text; *cf.* State *ex rel.* Knox v. Hines Lumber Co., 150 Miss. 1, 48, 115 So. 598, 605 (1928) (Mississippi courts have no power to make policy absent constitutional, statutory, or judicial authority). For a discussion of the limits on the judicial prerogative to make policy, see *supra* note 40 and accompanying text.

[58] 413 So.2d at 381-83. The court adopted the rationale of McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093 (1971). See *supra* note 36 for a discussion of *McCutcheon*.

[59] 413 So. 2d at 381. As an Illinois appeals court has stated: "[T]he execution of one exculpatory clause [is] not a matter of public concern, but the execution of numerous exculpatory clauses [is] a matter of social consequences and [makes] the leases a matter of social relationship." Simmons v. Columbus Venetian Stevens Bldgs., 20 Ill. App. 2d 1, 155 N.E.2d 372, 386 (1959).

[60] *See supra* note 23 and accompanying text.

[61] 413 So. 2d at 382.

[62] *Id.* The court distinguished *Smith v. Smith* as being "entirely different" from *Cappaert*. *Id.* In *Smith*, according to Justice Sugg, there was no common law duty on the part of the lessor to maintain the roof. Justice Sugg reasoned that because the exculpatory clause in *Smith* did not absolve the lessor of his common law duties, it should be validated and distinguished from the *Cappaert* clause. *Id.*

[63] *See supra* note 21 and accompanying text.

that area of the law.[64] Indeed, as the court's historic allegiance to the doctrine of "caveat lessee" demonstrates, Mississippi is, in the final analysis, a lessor-oriented state.[65]

Against that background, *Cappaert* appears at first glance to constitute a significant departure from earlier decisions;[66] but, upon closer examination, the case seems far less daring in its severance with prior Mississippi law. Although the decision might prove an enormous aid to aggrieved Mississippi tenants, the effectiveness of the ruling may be weakened by the questionable rationale employed by the court. For instance, in distinguishing the exculpatory clause in *Smith v. Smith*,[67] the court held that the lessor in *Smith* owed no common law duty to the lessee,[68] when actually he was under a common law duty to abide by his covenant to repair.[69] Though not alluded to by the court, there are three ways *Cappaert* and *Smith* might have been distinguished: (1) the duty in *Cappaert* to maintain the common areas was an affirmative one,[70] but the duty in *Smith* to repair was "passive," that is, contingent upon notification by the tenant;[71] (2) *Cappaert* contained a residential lease,[72] as opposed to the commercial lease at issue in *Smith*;[73] and (3) the plaintiff in *Cappaert* suffered personal injuries,[74] but her counterpart in *Smith* incurred only property damage.[75]

Had any of these differences been relied upon, the decision of the court to distinguish *Smith* would have been more understandable. As

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[64] In Arledge v. Gulf Oil Corp., 578 F.2d 130 (5th Cir. 1978), the Fifth Circuit Court of Appeals used the phrase "doctrinal conservatism" in characterizing the handling of one aspect of landlord-tenant law by the Mississippi Supreme Court. *Id.* at 132. *Arledge* dealt with the liability of a lessor to an injured third party for breaching a repair covenant contained in the lease. *Id.* at 131.

[65] *See supra* notes 19-20, 62, and accompanying text.

[66] For an illustration of the inequity inherent in the Mississippi common law on landlord tort liability, see Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 78 So. 2d 743 (1955). See *supra* note 15 for a discussion of *Ford*.

[67] 375 So. 2d at 1041; *see supra* note 62.

[68] *Cappaert*, 413 So. 2d at 382. The *Cappaert* court distinguished *Smith* by holding that "the exculpatory clause did not deal with any common law or statutory duty of the lessor." *Id.*

[69] *See supra* note 15 and accompanying text.

[70] *See supra* note 23 and accompanying text.

[71] *See* Wolf v. Mauceli, 237 Miss. 378, 384, 114 So. 2d 845, 848 (1959) (landlord not liable when tenant failed to notify of defective roof); *see also supra* note 15 (collection of similar authorities).

[72] *Cappaert*, 413 So. 2d at 378-79.

[73] *Smith*, 375 So. 2d at 1042.

[74] *Cappaert*, 413 So. 2d at 379.

[75] *Smith*, 375 So. 2d at 1042.

it stands, the distinction of *Smith* serves, if not as a model of legal analysis, at least as a warning of the intended narrow scope of the *Cappaert* holding. The *Cappaert* holding is only this: landlords cannot avoid their affirmative duty to maintain common areas by the use of an exculpatory clause.[76]

Consequently, questions arise whether a landlord might, in spite of *Cappaert,* exculpate himself from his duty to disclose latent defects.[77] If policy declarations are to be distinguished from one another, it might be advisable to adopt specific criteria for doing so, such as those set forth in *Tunkl v. Regents of the University of California.*[78] In *Cappaert,* such criteria were not adopted and, as a result, little deference was paid to the principle of freedom of contract.

Whenever a court decides to declare public policy, it risks infringing on the legislative domain.[79] A common argument made by the judiciary is that courts are obliged to intervene when the legislature is unwilling to act. Perhaps the Mississippi Legislature should respond by enacting a landlord-tenant statute akin to section 31-5-41 of the Mississippi Code, which provides that exculpatory clauses in construction contracts are void.[80] The problem with the uncertain breadth of the *Cappaert* holding might thereby be solved.

Brian A. Montague

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[76] *Cappaert,* 413 So. 2d at 382.

[77] *See supra* note 14 and accompanying text.

[78] *See supra* notes 47-48 and accompanying text.

[79] *See supra* notes 39, 45, 57-59, and accompanying text.

[80] MISS. CODE ANN. § 31-5-41 (Supp. 1982); *see supra* note 37.

Eminent Domain—Valuation of Condemned Res—Evidence of Business Factors Probative of Future Earnings is Properly Admissible in Condemnation Proceedings Concerning Certificates of Public Convenience and Necessity

Condemnor[1] petitioned the Eminent Domain Court of Madison County[2] to condemn a portion of a certificate of public convenience and necessity for water distribution[3] held by condemnee.[4] Neither party disputed that due compensation was required to be paid for the condemned portion of the certificate.[5] The condemnee urged that the award should be the diminution in value of condemnee's business as a going concern.[6] The condemnor insisted that the award should be the fair market value of the condemned portion of the certificate plus any diminution in the market value of the remainder due to the condemnation.[7] Therefore, condemnor moved in limine[8] to exclude evidence re-

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[1] The condemnor, the town of Madison, Mississippi, sought to provide water service to a recently annexed 245 acre tract of land on which a subdivision was being built. The annexation occurred after construction of the subdivision had begun. At the time the petition to condemn was filed, no water was being distributed within the area by any utility, although the condemnee, Bear Creek Water Association, had owned the exclusive right of distribution for some time under a certificate of public convenience and necessity. Bear Creek Water Ass'n v. Town of Madison, 416 So. 2d 399, 400 (Miss. 1982).

[2] The Mississippi Eminent Domain Courts were created pursuant to Miss. Code Ann. § 11-27-3 (1972).

[3] *See* Miss. Code Ann. § 77-3-11(1) (1972) (prohibiting commercial distribution of water for public consumption unless distributor holds certificate of public convenience and necessity for the service area); Mississippi Power & Light Co. v. City of Clarksdale, 288 So. 2d 9, 11-12 (Miss. 1973) (grant of certificate creates exclusive right, which is valuable property requiring due compensation upon expropriation); Capital Elec. Power Ass'n v. Mississippi Power & Light Co., 240 Miss. 139, 150-51, 125 So. 2d 739, 743 (1961) (manifest purpose of statute was to create exclusive right in certificate holder).

[4] 416 So. 2d at 400. Condemnee, Bear Creek Water Association, held a certificate of public convenience and necessity granting it exclusive commercial water distribution rights to an area of 39,136 acres abutting the corporate limits of the town of Madison, Mississippi. The town annexed 245 acres of this area and then filed a petition to condemn the applicable certificate of public conveience and necessity.*Id.*

[5] *Id.* The condemnee's only property interest in the acreage covered by the certificate was the exclusive right to distribute water in the area.*Id.*

[6] *Id.* at 400, 401. For a discussion of the going concern value concept, see *infra* note 47 and accompanying text.

[7] 416 So. 2d at 401.

[8] A motion in limine is a recently developed preclusive motion that prevents introduction of highly prejudicial evidence. Typically, the motion is made in advance of trial

garding the effect of the condemnation on the condemnee's potential future earnings.[9] The trial court adopted the condemnor's position and granted the motion in limine.[10] On appeal, the Mississippi Supreme Court, *held,* reversed and remanded. Evidence regarding the value of the holder's going concern, including future earnings potential, is important to a fully informed determination of the fair market value of the condemned portion of a certificate of public convenience and necessity and, therefore, is admissible in condemnation proceedings. *Bear Creek Water Association v. Town of Madison,* 416 So. 2d 399 (Miss. 1982).

The concept of due compensation for property taken for public use arises from judicial interpretation of constitutional provisions delimiting the sovereign's otherwise plenary power of eminent domain.[11]

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and, if successful, results in an instruction to opposing counsel to undertake reasonable efforts to withhold the particular proof from the record. McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 52 (E. Cleary 2d ed. Supp. 1978).

[9] The condemnee intended to offer the following evidence as probative of its going concern value before and after condemnation: (1) its capability to meet the current and future needs of the subject area; (2) the proximity of its physical plant to the subject area; and (3) the future profits to be realized from probable future needs of residents of the subject area. 416 So. 2d at 401.

[10] *Id.*

[11] McKean, *Constitutional Limitations upon the Power of Eminent Domain,* 6 ROCKY MTN. L. REV. 16, 16 (1933).

Eminent domain is the inherent power of a sovereign state to take private property for public use. This power derives from the law of necessity and, therefore, exists apart from any constitutional grant of authority. Zachary, *Extraordinary and Special Statutory Actions,* 30 MISS. L.J. 440, 449-51 (1959); *see* Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) (sovereign's inherent power of eminent domain can be delegated but not surrendered); Kohl v. United States, 91 U.S. 367, 371-72 (1876) (power of eminent domain is an inherent power of the sovereign essential to its autonomy and perpetual existence); *The Right of Eminent Domain,* 5 U. PA. L. REV. 1, 1-2 (1856). The power of eminent domain, however, can be limited by a constitution when the potency of the sovereign has been so conferred. *Id.; see Kohl,* 91 U.S. at 372.

Mississippi derives its power of eminent domain from both constitutional and statutory provisions. *See* MISS. CONST. art. III, § 17 (delimiting the state's inherent power of eminent domain). This provision of the constitution states:

> Private property shall not be taken or *damaged* for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

MISS. CONST. art. III, § 17 (emphasis added); *see also* MISS. CODE ANN. §§ 11-27-1 to -91 (1972) (statutes circumscribing eminent domain power and establishing condemnation procedure in Mississippi).

The fifth amendment to the United States Constitution expressly prohibits the taking of private property for public use without just compensation to the owner.[12] Most state constitutions contain similar restrictions on the state's power of eminent domain.[13] The Mississippi constitutional limitation on the state's power of eminent domain is apparently more restrictive than that of the fifth amendment.[14] The United States Supreme Court has interpreted language of the fifth amendment as requiring compensation to a comdemnee only in the amount of the fair market value of the property actually taken, without regard to any additional adverse effect the condemnation may have on the condemnee.[15] Incidental to a strict construction of what is com-

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[12] The fifth amendment provides in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

Just compensation is the fair market value in terms of money of the condemned res at the time it is taken. *See, e.g.*, Cameron Dev. Co. v. United States, 145 F.2d 209, 210 (5th Cir. 1944). See *infra* note 22 and accompanying text for a discussion of fair market value.

[13] *See, e.g.*, N.Y. CONST. art. I, § 7 (requiring just compensation for property taken); TEX. CONST. art. I, § 17 (requiring adequate compensation for property taken, damaged, or destroyed); *cf.* N.C. CONST. art. I, § 19 (property shall not be taken except by due process of law).

It should be noted that, as a minimum, the owners of property condemned by the several states are entitled to just compensation according to the standard that has evolved under the fifth amendment to the United States Constitution and applied to the states by the fourteenth amendment. Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 233, 236-39, 241 (1897); *see also* THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. 1178-79 (1973) (due process of law violated in absence of compensation provision); Zachary, *supra* note 11, at 450-51 (same).

[14] MISS. CONST. III, § 17 (emphasis added), provides that "private property shall not be taken *or damaged.*" The fifth amendment contains no reference to damage. *See supra* note 12 (text of fifth amendment).

[15] The leading federal case defining just compensation under the fifth amendment states the proposition:

> [J]ust compensation, it will be noticed, is for the property, and not the owner. Every other clause in the fifth amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken.

Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893). One commentator has referred to the doctrine in *Monongahela* as the "in rem-in personam dichotomy." Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61, 67 (1957). The language of Supreme Court opinions after *Monongahela* has occasionally strayed from strict adherence to the in rem approach. *See, e.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (Justice Stewart's statement that the

pensable under the fifth amendment is a very strong reluctance by the Court to compensate a condemnee for profits lost when productive property is wholly or partially taken by condemnation.[16]

In the leading Mississippi decision construing the applicable Mississippi constitutional provisions, *Mississippi State Highway Commission v. Hillman,*[17] the Mississippi Supreme Court concisely stated the rule to be applied by the lower courts in determining due compensation in cases involving a partial taking.[18] The"before and after rule," as

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Constitution was written to protect the rights of *people*); Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910) (Justice Holmes stating same).

For an opinion in which the Court adopted language both supportive of and contrary to the in rem-in personam dichotomy, see United States v. Miller, 317 U.S. 369, 373, 376 (1942), in which the Court said that the purpose of the fifth amendment is to put the *owner* in as good a position after the taking as before and that the Constitution has never been construed to require payment of consequential damages to the condemnee. For a discussion of consequential damages, see *infra* note 25.

Notwithstanding its intermittent use of language inconsistent with the in rem approach, the Supreme Court, as well as lower federal courts, has followed that approach in condemnation cases. *See, e.g.,* United States v. 564.54 Acres of Land, 441 U.S. 506, 516 (1979) (nontransferable values arising out of condemnee's special use of the condemned res are noncompensable); Joslin Mfg. v. Providence, 262 U.S. 668, 676-77 (1923) (condemnee's cost of removing personalty from the condemned parcel is noncompensable); United States v. 40.81 Acres of Land, 505 F. Supp. 151, 152 (E.D. Pa. 1981) (just compensation does not include award for condemnee's inconvenience); United States v. Building Known as 651 Brannan St., 55 F. Supp. 667, 670 (N.D. Cal. 1944) (just compensation is in rem in nature); Georgia-Pacific v. United States, 640 F.2d 329, 366 (Ct. Cl. 1980) (condemnee denied costs of borrowing money made necessary by condemnor's failure to pay condemnation award at time of taking); Miller v. United States, 620 F.2d 812, 825 (Ct. Cl. 1980) (special values of condemned res are noncompensable).

[16] *See* United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 281-82 (1943) (stating that fifth amendment does not require compensation for opportunities lost by the property owner); Mitchell v. United States, 267 U.S. 341, 343, 345-46 (1925) (denying compensation for the going concern value of a specialized farming business that condemnee could not re-establish elsewhere); Sullivan v. Associated Billposters and Distribs., 6 F.2d 1000, 1011 (2d Cir. 1925) (business or its goodwill is not property within meaning of fifth amendment); *cf.* Armstrong v. United States, 364 U.S. 40, 49 (1960) (Justice Black implying that business opportunities lost because of condemnation of productive property is a cost of contemplated project that is borne by condemnee individually rather than by public); Kimball Laundry Co. v. United States, 338 U.S. 1, 14-16 (1949) (allowing compensation for going concern value of trade routes destroyed when U.S. Army took *temporary* control of laundry business).

[17] 189 Miss. 850, 198 So. 565 (1940).

[18] *Id.* at 866, 198 So. at 569. The determination of the adequacy of compensation is a judicial question. Monongahela Nav. Co. v. United States, 148 U.S. at 327-28; Isom v. Mississippi Cent. R.R., 36 Miss. 300, 314-15 (1858). On the other hand, the determination of the existence of a public necessity required for a taking is initially a legislative question that can be judicially overruled in certain special instances. *See* Cole v. La

it has been called,[19] awards the property owner the difference between the fair market value of the whole res immediately before the taking and the fair market value of that part remaining after the taking.[20] The court stated that this rule was not a new one, but had existed by implication in decisions of the court dating back to 1883.[21] In *Hillman*, the court defined fair market value as the hypothetical price[22] an informed buyer would pay a seller for property if neither was under compulsion to act.[23]

The before and after rule, in strict application, does not seek to indemnify the property owner for all of his losses or inconvenience caused by a condemnation; rather, its purpose is merely to accomplish a substitution of money for the condemned res.[24] The Mississippi Supreme Court has not given the rule strict application in some cases, and, as a result, incidental losses of some condemnees have been paid under the guise of due compensation.[25] Nonetheless, the court has vigi-

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Grange, 113 U.S. 1, 6, 9 (1885) (prohibiting municipality's use of power of eminent domain to assist selected private businesses in acquiring particular properties); Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 20, 156 So. 2d 572, 578 (1963) (requisite judicial inquiry into existence of public need has been made when court is satisfied that legislature has not abused its discretion); MISS. CONST. art. III, § 17 (declaring existence of a public necessity to be a judicial question); *cf.* Berman v. Parker, 348 U.S. 26, 35-36 (1954) (rights of condemnees are protected by receipt of just compensation). *See generally* Comment, *Mississippi Eminent Domain Law*, 44 MISS. L.J. 692, 693-96 (1973) (discussing general rule that public necessity is within province of the legislature).

[19] Jones, *Just Compensation Via Fair Market Value May Not Include the Kitchen Sink—It Could Be Noncompensable*, 46 MISS. L.J. 1, 1 (1975).

[20] 189 Miss. at 866, 198 So. at 569.

[21] *Id.*, 198 So. at 569; *see* City of Meridian v. Higgins, 81 Miss. 367, 381, 33 So. 1, 1 (1902) (stating rule by implication); Balfour v. Louisville, N.O. & Tex. R.R., 62 Miss. 508, 510 (1885) (same); Sullivan v. Board of Supervisors, 61 Miss. 271, 282 (1883) (same).

[22] In United States v. Miller, 317 U.S. 369, 375 (1942), Justice Roberts commented that fair market value "involves, at best, a guess by informed persons."

[23] 189 Miss. at 869, 198 So. at 571.

[24] Jones, *supra* note 19, at 4-5.

[25] *Id.* at 6; *see* Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335, 337 (Miss. 1970) (rejecting indemnity approach, but awarding lessee expenses to remove his personalty from condemned leasehold); Mississippi State Highway Comm'n v. Rogers, 242 Miss. 439, 444-46, 136 So. 2d 216, 218-19 (1961) (awarding expenses for removal of personalty to condemnee of a fee simple).

The fair market value approach to valuation should be distinguished from the indemnification, or "value to the owner" approach. Under the indemnification method a condemnee receives, in addition to the hypothetical fair market value of the condemned res, any consequential losses he suffers as a proximate result of the condemnation. 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 14, at 75 (2d ed. 1953).

Athough opinions use the terms "consequential" and "severance" damages interchangeably, they are, in fact, concepts with distinct meanings, with the former encom-

lantly guarded against indemnification of a property owner for lost profits from a business affected by the condemnation.[26] Toward this end, the court has consistently denied introduction of any testimony concerning future profitability or yield,[27] apparently based upon the thought that, among other things, such testimony unduly influences jurors in their determination of the market value of the condemned res.[28]

The leading Mississippi case concerning the admissibility of testimony in determining the probable yield from the condemned res is *Board of Levee Commissioners v. Hendricks*.[29] In this case, decided in 1900, the state condemned certain farmland owned by Hendricks,[30]

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passing the latter. Consequential damages, which result from the application of the indemnification method, include the condemnee's inconvenience, while severance damages refer to the diminution in value of the residue resulting from a partial taking. Severance damages is an element of value arising from the relation of the condemned portion of the res to the remainder. United States v. 32.99 Acres of Land, 211 F. Supp. 61, 64 (D. Kan. 1962). *See generally* 4A Nichols, The Law of Eminent Domain § 14.01[3] (J. Sackman & R. Van Brunt rev. 3d ed. 1981) (discussion of severance damages).

[26] One commentator has observed that the Mississippi Supreme Court uses the term "consequential damages" to mean "severance damages." Thus, a statement by the court that consequential damages are due is not necessarily inconsistent with the court's rejection of the indemnification approach in *Hillman*. *See* Jones, *supra* note 19, at 13.

[27] Such testimony has been rejected on two grounds. First, profits are not compensable as a separate item of damages under the *Hillman* rule. Seago Enters. v. Mississippi State Highway Comm'n, 330 So. 2d 588, 590 (Miss. 1976); *see* Mississippi State Highway Comm'n v. Ladner, 243 Miss. 139, 143, 137 So. 2d 791, 792 (1962) (condemnee unsuccessfully sought lost profits from forced cessation of dairy business). *But cf.* Mississippi State Highway Comm'n v. St. Catherine Gravel Co., 380 So. 2d 231, 235-36 (Miss. 1979) (Broom, J., dissenting) (arguing that the condemnor should be bound by its failure to object to jury instruction contrary to the rule). Second, the condemnor does not take the condemnee's business, which can be moved elsewhere; only the situs of the business is taken. Mississippi State Highway Comm'n v. McCardle, 243 Miss. 111, 119, 137 So. 2d 793, 796-97 (1962). *Contra* Wheeler v. State Highway Comm'n, 212 Miss. 606, 614, 55 So. 2d 225, 227 (1951) (jury may consider any element affecting value of property remaining without regard to condemnee proprietor's ability to relocate). *See generally* 4A Nichols, *supra* note 25, § 13.3 (discussing condemnation of realty serving as situs of a business).

[28] Mississippi State Highway Comm'n v. Rogers, 236 Miss. 800, 808-09, 112 So. 2d 250, 253 (1959).

The Court has also based the exclusion of such testimony on the ground that future profits lost because of the condemnation of productive property are not legally compensable. *Id.* at 807-08, 112 So. 2d at 252-53. In *Rogers*, the court apparently presumed that jurors who hear testimony concerning likely future yields are unable to resist the temptation to increase the condemnation award to compensate a condemnee specially for future profits unrealizable because of the condemnation of his productive property. *See id.* at 808-09, 112 So. 2d 252-53. *See supra* note 27.

[29] 77 Miss. 483, 27 So. 613 (1900).

[30] *Id.* at 485, 27 So. at 614. The levee commissioners sought condemnation of 9.89 acres of land, consisting of farmland and an orchard. *Id.*, 27 So. at 614.

who offered expert testimony to the effect that if the land were well cultivated its value would have been much greater.[31] The court held this testimony improper in establishing fair market value.[32]

Just three years after *Hendricks*, in *Board of Levee Commissioners v. Nelms*,[33] the court declared testimony concerning *past* yields of specific tracts admissible toward establishing their fair market values.[34] In the case of *Mississippi State Highway Commission v. Stout*,[35] decided in 1961, the court admitted testimony of the condemnee's son on the past yield of a pecan orchard growing on the condemned acreage.[36] The court said that admission of the testimony was consistent with both *Hendricks* and *Nelms*, since it dealt only with past yields and had been properly qualified in terms of the before and after rule.[37]

One year later, in *Stegall v. City of Jackson*,[38] the Mississippi Su-

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[31] *Id.* at 486, 27 So. at 614. The land sought to be taken was valued by the appraisers at $593.40, and the damage to the orchard and premises was assessed at $125. The county assessor testified that the land had been assessed at $15 per acre, meaning that if it were well cultivated the land would be worth $100 per acre. At the time, $50 per acre was the market price of the best land in the county. The witness speculated that the orchard would be worth $400 if well kept. *Id.*, 27 So. at 614-15.

[32] *Id.*, 27 So. at 614-15.

[33] 82 Miss. 416, 34 So. 149 (1903). An appraisal was made of the land condemned, allowing the condemnees $55.50 per acre for the land situated outside the levee and $35.50 per acre for the land inside the levee. From this award, the owners of the land appealed to the circuit court. *Id.* at 417, 34 So. at 150.

[34] *Id.* at 420, 34 So. at 150. The condemnees presented testimony showing the rental value of the land, the rental value of similar land in the area, and anticipated yields of various crops that the land was capable of producing, but which had not previously been grown on the condemned tract. *Id.*, 34 So. at 150.

[35] 242 Miss. 208, 134 So. 2d 467 (1961), *overruled on other grounds*, Leflore v. Mississippi State Highway Comm'n, 390 So. 2d 284, 286 (Miss. 1980).

[36] 242 Miss. at 219, 134 So. 2d at 470-71.

[37] *Id.* at 219-20, 134 So. 2d at 471. In concluding that Stout's testimony was admissible, the court noted that the testimony had been given by the condemnee's son who had himself worked the orchard and had first-hand knowledge of actual past yields. The court stated:

> Such testimony is admissible when it affects the before or after value, thus affecting the depreciated value, if the witness testifies in accordance with the before and after taking rule, and connects such specific items with the before and after market values, and considers them only as bearing upon such market values.

Id. at 220, 134 So. 2d at 471.

[38] 244 Miss. 169, 141 So. 2d 236 (1962).

The condemnee in *Stegall* was a subdivider who had constructed a sewer system to service his housing development. As a condition of receiving sewer service, home buyers had to agree to pay to condemnor developer a one-time "tap-on" fee plus a monthly sewer maintenance fee. The city of Jackson annexed the subdivision and condemned the

preme Court, again citing *Hendricks,* stated unequivocably that testimony about future profits was inadmissible in a condemnation proceeding to establish a claim of lost profits as a special element of damages.[39] The court also held that testimony on the future profitability of condemned productive property offered to establish the before and after value of that property was inadmissible because business profits were "extremely speculative" and "highly uncertain."[40] The court expressed the fear that a contrary rule would open a Pandora's box of speculation over the profitability of possible alternative uses for the condemned res.[41] In any event, the court said that neither businesses nor profits were the objects of condemnation proceedings.[42]

Despite the Mississippi Supreme Court's historical intransigence on the issue of admissibility of testimony concerning probable future earnings, evidence of that exact character was declared admissible to determine due compensation for the condemnee in *City of Jackson v. Creston Hills, Inc.*[43] The condemnee was the holder of a certificate of public convenience and necessity for water distribution for a defined area. The condemnee's business was interfered with and eventually destroyed by an expansion of the city's water utility into the certificated service area.[44] The court found the gradual ouster to be a taking[45] and allowed as an item of special damages profits that were lost prior to the taking because of the "unlawful competition" practiced by the munici-

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sewer system, but refused to pay condemnee the present value of expected future maintenance fees. *Id.* at 174-76, 141 So. 2d at 237-39.

[39] *Id.* at 183, 141 So. 2d at 242.

[40] *Id.*, 141 So. 2d at 242; *see* Mississippi State Highway Comm'n v. Rogers, 236 Miss. 800, 807, 112 So. 2d 250, 252-53 (quoting JAHR, EMINENT DOMAIN § 150 (1953)).

[41] *Id.*, 141 So. 2d at 242; *see* Pearl River Valley Water Supply Dist. v. Brown, 254 Miss. 685, 697-99, 182 So. 2d 384, 388-89 (1966) (discussing limits of court's tolerance on profit potential of a condemned res in the highest and best uses context). *See generally* 4A NICHOLS, *supra* note 25, § 12.314, at 250-57.

[42] *See supra* notes 27, 40 and accompanying text; *see also* Mississippi State Highway Comm'n v. Valentine, 239 Miss. 890, 894-95, 124 So. 2d 690, 692 (1960) (substantial adverse impact of condemnation of land upon condemnee's cattle farming operations declared not to be a taking of condemnee's cattle business).

[43] 252 Miss. 564, 172 So. 2d 215 (1965).

[44] After annexing the condemnee's service area, the city laid water mains sufficient to supply fire hydrants that were to be installed in the area. The city notified area residents that they would save money by having connections run in conjunction with the construction rather than at some later date. Gradually, enough residents connected with the city's system to force condemnee out of business. *Id.* at 570-72, 172 So. 2d at 218.

[45] The court held that when the city invaded the area covered by the certificate, Creston was justified in ceasing operations of the utility. *Id.*, 172 So. 2d at 221.

pal utility.[46]

The court further stated that it would allow a condemnation award in the amount of the condemnee's going concern value[47] at the

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[46] *Id.* at 570, 172 So. 2d at 222.

The court's holding is reconcilable with its holding in *Stegall* that testimony concerning probable lost profits was inadmissible to establish a claim for those lost profits as a special element of damages in a condemnation proceeding. *See supra* note 39 and accompanying text. In *Creston Hills*, the separate award for lost profits arose from an implicit claim for damages for the city's encroachment into condemnee's service area. *Creston Hills*, 252 Miss. 578-79, 172 So. 2d at 222. Encroachment by a municipal utility into a certificated area gives the certificate holder, initially, a right to sue for damages for unlawful competition. *Id.* at 577, 172 So. 2d at 221. If the interference is so great as to compel the certificate holder to cease operations, that interference becomes a taking. *Id.* at 576, 172 So. 2d at 221. This entitles the ousted certificate holder to due compensation under the going concern value rule. *Id.* at 578-79, 172 So. 2d at 222. When this occurs, the condemnee receives two separate awards. One represents profits that would have been earned by the certificate holder had the encroachment not occurred. *Id.*, 172 So. 2d at 222. The other represents the going concern value of the certificate taken, based upon the level of profitability existing at the time the taking occurred, as restored by the encroachment award. *Id.*, 172 So. 2d at 222. For a discussion of the rights of certificate holders concerning encroachment into their service area, see MISS. CODE ANN. § 77-3-13 (1972).

[47] One court has attempted to define going concern value:

> The term "going value" is somewhat vague . . . . It has been variously spoken of as the "difference between a dead plant and a live one" or "the element of value which comes from the fact that the property is sold as a going-concern" . . . .
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> . . . .
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> . . . [T]he fundamental difficulty with the attempt to set a definite sum as the measure of going value is that it is an attempt to divide a thing which is, in its nature, practically indivisible. The value of the plant and business is an indivisible gross amount; it is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all, not as separate things, but as inseparable parts of one harmonious entity, and exercising the judgment as to the value of that entity.

Appleton Waterworks Co. v. Railroad Comm'n, 154 Wis. 121, 142 N.W. 476, 484 (1913) (citations omitted).

Implicit in this additional value by synergism is goodwill, or the probability that patrons will return for additional goods and services as the need arises and bring with them new patrons and so on. This goodwill may arise from several sources: (1) accessibility of the business to prospective patrons; (2) innovative or unique productive processes that make the offered goods or services more attractive to consumers; and (3) personal attributes of firm personnel. When any one or more of these factors exist, their effect on the success of an enterprise increases (or decreases if negative) the likelihood of future profitability. This, in turn, makes the enterprise a more attractive investment. *See* Note, *An Inquiry into the Nature of Goodwill*, 53 COLUM. L. REV. 660, 661-68 (1953). *See generally* Foreman, *Conflicting Theories of Good Will*, 22 COLUM. L. REV. 638 *passim*

date of the taking.[48] In adopting this enlightened view toward fair market value of a condemned certificate of public convenience and necessity, the court offered no guidance on what the jury may consider in determining going concern value.[49] Adding to the confusion in this area of the law,[50] one of the cases cited in *Creston Hills* as authority dealt with a condemnee utility whose prospective profitability was in substantial doubt.[51]

In the instant case the Mississippi Supreme Court reaffirmed its earlier position that a certificate of public convenience and necessity is a valuable property right.[52] The court found that since this right had been taken for public use, the holder was entitled to due compensation.[53] Also, since the certificate represented an exclusive right[54] having value, or potential value, to its holder only as a going concern,[55] the

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(1922) (discussing various sources of goodwill).

[48] 252 Miss. at 578, 172 So. 2d at 222.

The award for lost profits in *Creston Hills* theoretically returned the certificate holder to the status quo at the time of the taking, so that its going concern value could be determined from the date of the taking. The use of the award of damages for the unlawful competition as a substitute for the profits that would have been earned but for the unlawful competition had the substantive effect of determining going concern value at the date the city originally entered the service area. *Id.* at 578-79, 172 So. 2d at 221-22; *see supra* notes 44, 46 and accompanying text.

[49] 252 Miss. at 578-79, 172 So. 2d at 222.

[50] Jones, *supra* note 19, at 3-4; *see* Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain,* 6 CAL. W.L. REV. 57, 57-61 (1969) (discussing confusion in this area of law).

[51] *Creston Hills*, 252 Miss. at 578, 172 So. 2d at 222 (citing Pacific Gas & Elec. Co. v. Delvin, 188 Cal. 33, 203 P. 1058, 1064 (1922) (court discussing evidence presented that condemnee utility was operating unprofitably with little chance of increased demand for water service in service area)).

There was testimony in *Appleton Waterworks,* cited as authority for the *Creston Hills* decision, that the condemned utility had failed to generate any significant return on its normal operations and, in fact, required a large expenditure to become efficient at its then existing operating level. Appleton Waterworks Co. v. Railroad Comm'n, 154 Wis. 121, 142 N.W. 476, 485 (1913).

[52] Bear Creek Water Ass'n v. Town of Madison, 416 So. 2d 399, 402 (Miss. 1982) (per curiam). The opinion was authored by Chief Justice Patterson. *See supra* note 3 and accompanying text.

[53] 416 So. 2d at 400.

[54] *See supra* note 3 and accompanying text.

The exclusive right granted by a certificate of public convenience is personal property notwithstanding the fact that the certificate is closely identified with a specific geographical area. Teche Lines v. Board of Supervisors, 165 Miss. 594, 608-10, 142 So. 24, 27 (1932).

[55] 416 So. 2d at 402; *see supra* note 47 and accompanying text.

court reasoned that the measure of the condemnation award should be the diminution in the fair market value of the condemnee's business as a going concern caused by the condemnation.[56] Finally, the court stated that since fair market value is the price that a willing buyer will pay and a willing seller will accept, neither being compelled to do so,[57] and since an informed purchaser of an existing business reasonably would be expected to consider probable future earnings of the property in deciding to buy,[58] evidence of business factors probative of future earnings is properly admissible in condemnation proceedings for certificates of public convenience and necessity.[59]

On first impression, *Bear Creek* appears to further confuse an already confusing area of the law.[60] When read as a whole, however, the aforementioned Mississippi opinions reveal a tripartite doctrine—that is, a set of three mutually consistent substantive rules of law. First, loss of future profits is noncompensable as a separate item of damages insofar as the claim arises out of the condemnation of productive property; that is, the condemnee is not entitled to the net present value of future profits unrealizable because of the condemnation of his productive property, and evidence to that end is conclusively inadmissible.[61] Second, as a general rule, since future earnings potential is highly speculative in nature and any business operation connected with the property is not the object of the condemnation proceedings, such potential cannot be considered in the valuation of condemned productive property.[62] Last, in those unique situations in which the essential purpose of the condemnation proceeding is to take a business *qua* business, future earnings potential may be considered in valuation insofar as it would be relevant to the decision-making processes of a prospective arms-length purchaser.[63]

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[56] 416 So. 2d at 401.

[57] *Id; see supra* notes 22-23 and accompanying text.

[58] 416 So. 2d at 403. The court gave some guidance on those factors that an informed purchaser might consider: "past revenues, present physical facilities, the likelihood of expansion, [and] the likelihood of future revenues." *Id.*

[59] *Id.*

[60] *See supra* note 50 and accompanying text.

[61] *See supra* notes 27, 46-48 and accompanying text.

A condemnor has taken a business *qua* business when it takes the business itself and intends to operate the business in essentially the same manner and for essentially the same purposes as it was being operated by the condemnee at the time of the taking. *See* BLACK'S LAW DICTIONARY 1403 (rev. 5th ed. 1979) (defining *qua*).

[62] *See supra* notes 27, 28, 37, 40-42 and accompanying text.

[63] *See supra* notes 43-49 and accompanying text. Note that in the condemnation of business situs realty, the proprietor is deprived only of the attribute of goodwill concern-

In *Bear Creek* the condemnee neither asked for nor was awarded lost profits as a special element of damages.[64] But, in relying on *Creston Hills*,[65] the court addressed by implication the proposition that such damages remain *damnum absque injuria*[66] in Mississippi. Hence, the instant opinion should be considered consistent with the *Hillman* line of cases, which have heretofore denied damage claims for lost profits in all condemnation cases.[67]

In *Creston Hills* and *Bear Creek* the court took judicial notice that a certificate of public convenience is vital to the very existence of a public utility as a going concern.[68] Drawing upon the court's premise concerning the longevity of a public utility operating under a certificate, it is reasonable to conclude that condemnation of the certificate is a taking of the business *qua* business.[69] The next logical step is to regard as inapplicable those cases in the *Hillman* line not admitting testimony of future earnings for valuation purposes, because in those cases the condemnations were not takings of the businesses.

At this point, the court appears to have carved out an exception to the rule that speculative valuation testimony concerning future earnings is inadmissible in condemnation proceedings.[70] Although the scope of this exception is currently unclear, it may be found to extend to any case in which the condemnee can make a credible showing that, in taking realty, the condemnor has taken the business *qua* business.[71] If this

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ing the accessibility of the condemned business to its customers, while he retains the other more personal attributes—such as personality, inventiveness, and business intuition of business personnel—of which he may avail himself in reestablishing a similar business elsewhere. Saver v. Mayor of New York, 44 A.D. 305, 60 N.Y.S. 648, 651 (App. Div. 1899). The public utility condemnee, however, is arguably deprived of all the attributes of goodwill because of the general inability of utilties to choose their service areas. This deprivation makes the determination of going concern value after the condemnation less speculative in the utility context. *See supra* notes 27, 47 and accompanying text.

[64] 416 So. 2d at 400-01.

[65] *Id.* at 401-02; *see supra* notes 27, 39, 45-46 and accompanying text.

[66] BLACK'S LAW DICTIONARY 354 (rev. 5th ed. 1979) defines *damnun absque injuria* as "[l]oss, hurt, or harm without injury in the legal sense."

[67] *See supra* notes 27, 46, 48 and accompanying text.

[68] *Bear Creek*, 416 So. 2d at 402; City of Jackson v. Creston Hills, Inc., 252 Miss. 564, 578, 172 So. 2d 215, 221 (1965).

[69] *See supra* notes 27, 47 and accompanying text; *see also* 4A NICHOLS, *supra* note 25, § 13.3, at 190 (discussing trend of awarding going concern value where condemnation destroys the business' going-concern value and where as a practical matter, business cannot be relocated without suffering irreparable damage).

[70] *See supra* notes 27, 28, 37, 40-42 and accompanying text.

[71] *See generally* 4A NICHOLS, *supra* note 25, § 13.3 (discussing development and direction of trends in determination that taking of realty is a taking of business).

exception is so extended, when deciding the factual issue whether the business itself has been taken, jurors must be allowed to hear testimony recently referred to by the court as "highly speculative" and "uncertain."[72] Such evidence then must be considered by the jury in determining the before and after going concern value of that business.

A more plausible view is that the exception will have a narrower scope and, quite possibly, may be limited in its application only to those cases involving a complete or partial condemnation of a certificate of public convenience and necessity. This view draws support from both *Creston Hills* and *Bear Creek,* since the court in both cases took judicial notice that condemnation of the certificate was a condemnation of the holder's business *qua* business.[73] It also reduces the determination of fact to the before and after going concern value of the business. This narrower application gives the court more control over the admissibility of highly speculative evidence, a view fully consistent with the entire *Hillman* line of cases and the existence of a tripartite doctrine[74] of dealing with such evidence.

The contribution that *Bear Creek* has made to the law of eminent domain is in informing the lower courts and practitioners of several factors upon which evidence may be received in arriving at before and after going concern values.[75] This guidance by the court is particularly important when a certificate is wholly or partially condemned before a

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[72] Mississippi State Highway Comm'n v. St. Catherine Gravel Co., 380 So. 2d 231, 233 (1979). *See supra* notes 40-42 and accompanying text.

[73] *See Bear Creek,* 416 So. 2d at 402; *Creston Hills,* 252 Miss. at 579, 172 So. 2d at 221-22.

[74] *See supra* notes 61-63 and accompanying text (discussing tripartite doctrine concerning admissibility of potential earnings evidence).

[75] *See supra* note 58 and accompanying text. In the opinion the court also evinced a willingness to hear testimony regarding the probability of residential growth and its effect on future earnings. *Bear Creek,* 416 So. 2d at 402. *Contra* Mississippi State Highway Comm'n v. Burwell, 206 Miss. 490, 498, 39 So. 2d 497, 498 (1949) (denying admission of evidence of growth pattern of nearby town in valuing condemned realty as "guesswork").

Since the *Burwell* rule is inapplicable in valuation of a going concern, the same may be true of the rule expressed in Mississippi State Highway Comm'n v. Ellzey, 237 Miss. 345, 114 So. 2d 769 (1959). In *Ellzey,* the court refused to allow valuation testimony on those more productive uses to which the condemnee could have put the property if he had had the necessary capital. *Id.* at 350, 114 So. 2d at 771-72. Inapplicability of the *Ellzey* rule in the going concern value context would be consistent with the existence of an exception to the *Hendricks-Nelms-Stout* line of cases, which declared inadmissible for valuation purposes evidence concerning future profitability and yield. *See supra* notes 29-37 and accompanying text. *Ellzey* merely added substance to *Hendricks,* which had held inadmissible evidence of what could have been produced on a productive tract had it not been taken for public use. *See supra* notes 29-32 and accompanying text.

steady earnings stream has been established.[76] Since the court did not state that its listing was all-inclusive,[77] the question probably remains open on what *cannot* be considered by a jury in determining future profit potential for valuation purposes. Consequently, the practitioner should be innovative in making his record, including in it anything that "a businessman interested in buying a going business" would consider.[78]

Jimmy Ried Sledge, Jr.

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[76] Unlike Creston Hills, Inc., which had an established pattern of earnings at the time the city began the encroachment that became a "taking", Bear Creek Water Association had yet to realize any earnings from the service area to which the condemnation related. *See supra* notes 1, 2, 44-46 and accompanying text.

[77] *Bear Creek*, 416 So. 2d at 402, 403.

[78] 416 So. 2d at 403.

Admiralty—Tort Jurisdiction—Jurisdiction Sustained on Claim Resulting from Collision of Pleasure Boats on Navigable Waters

Plaintiffs,[1] invoking admiralty jurisdiction,[2] filed suit in the United States District Court for the Middle District of Louisiana to recover damages for a collision of two pleasure boats[3] on a river.[4] The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction.[5] The court reasoned that the collision of the two pleasure boats did not involve commercial activity—such activity being deemed necessary to bring the case within the established contours of federal admiralty subject matter jurisdiction.[6] The United States Court of Appeals for the Fifth Circuit reversed.[7] On writ of certiorari, the United States Supreme Court, *held*, affirmed. When two pleasure boats collide on navigable waters, there is a sufficient nexus to traditional maritime activity to sustain federal admiralty jurisdiction. *Foremost Insurance Co. v. Richardson*, 102 S. Ct. 2654 (1982).

There are significant differences, both in the substantive rules and the procedural practices, between courts of admiralty and the state courts of law.[8] The substantive rules of decision in admiralty come

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[1] Plaintiffs were the wife and children of the decedent. Foremost Ins. Co. v. Richardson, 102 S. Ct. 2654, 2656 (1982). They alleged that defendant Shirley Eliser had negligently operated the boat that collided with the vessel occupied by the decedent. *Id.* Also named as defendants were Foremost Insurance Co., Eliser's insurer, and June Allen, the alleged operator of the boat in which decedent was a passenger. *Id.* at 2656 n.1.

[2] Plaintiffs brought suit under 28 U.S.C. § 1333(1) (1976), which vests in the United States district courts subject matter jurisdiction over civil cases of admiralty or maritime jurisdiction. 102 S. Ct. at 2656.

[3] The district court found that one boat was used for pleasure boating, while the other was used exclusively for pleasure fishing. There was no evidence that either boat was, or had been at any time, engaged in commercial activity. Richardson v. Foremost Ins. Co., 470 F. Supp. 699, 700 (M.D. La. 1979), *rev'd*, 641 F.2d 314 (5th Cir. 1981), *aff'd*, 102 S. Ct. 2654 (1982).

[4] The collision occurred on the Amite River in Louisiana. 102 S. Ct. at 2656.

[5] *Id.* at 2656.

[6] *Id.* at 2657.

[7] Richardson v. Foremost Ins. Co., 641 F.2d 314, 316 (5th Cir. 1981), *aff'd*, 102 S. Ct. 265 (1982). The Fifth Circuit agreed that the wrong must bear a significant relationship to traditional maritime concerns, but found that commercial activity was not necessary to establish this relationship. 641 F.2d at 315-16.

[8] Robertson, *Jurisdictional Dilemma in Pleasure Boat Accident Cases*, 8 Miss. Def. Law. J. 8, 12 (1973).

from federal maritime law, which supersedes the, sometimes idiosyncratic, tort law of the state where the admiralty claim arose.[9] Four differences that illustrate admiralty's departure from the common law are worth noting. First, there is the maritime doctrine of limitation of liability. This doctrine states that the owner of a vessel may limit his liability for any loss occurring "without the privilege or knowledge of such owner" to the value of the vessel.[10] This rule contrasts starkly with the common law notion that a person should be held responsible for the actual consequences of his actions. Second, there is the availability of in rem seizure. This rule allows a claimant to proceed against the vessel itself rather than just against the owner in personam.[11] Third, there is the principle of laches. Generally, courts of admiralty do not rely upon a statute of limitations to foreclose claims,[12] but instead appeal to notions of equity and will only preclude claims when prejudice results from the untimely filing of a claim.[13] Fourth, there is no right to a jury trial. The seventh amendment to the Constitution

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[9] *Id.* at 12-16; *see* St. Hilaire Moye v. Henderson, 496 F.2d 973, 979-81 (8th Cir. 1974) (admiralty jurisdiction allowed a pleasure boat passenger to recover damages in spite of a state guest boating statute that forbade such recovery absent willful and wanton negligence). *See generally* Comment, *Admiralty Law and Pleasure Boating in Nebraska*, 45 NEB. L. REV. 572, 580-82 (1966) (discussion of differences between general maritime law and state common law).

[10] 46 U.S.C. § 183(a) (1976). This limitation was extended to pleasure boats in Coryell v. Phipps, 317 U.S. 406, 412 (1943), in which it was applied to an owner of a yacht. In Pershing Auto Rental v. Gaffney, 279 F.2d 546 (5th Cir. 1960), the limitation of liability doctrine was applied to a 26-foot pleasure boat with a value of $500 in the face of claims asserted against the vessel in the amount of $558,000. *Id.* at 548.

There has been widespread criticism from commentators over the application of the doctrine of limitation of liability to pleasure boats. *See generally* Harolds, *Limitation of Liability and Its Application to Pleasure Boats*, 37 TEMP. L.Q. 423, 428 (1964) (nothing in Congressional Record to indicate that limitation of liability was intended to apply to pleasure boats); Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 710 (no federal interest in applying limitation of liability to pleasure boats); Note, *Tort Liability of the Ohio Pleasure Boat Owner*, 16 W. RES. L. REV. 949, 956 (1965) (no connection between purpose of limitation of liability and pleasure boats).

[11] *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, §§ 1-12 (2d ed. 1975) (discussion of in rem seizure).

[12] An exception to this general application of laches was adopted by Congress in 1980. The statute of limitations for maritime personal injury cases is now "three years from the date the cause of action accrued." 46 U.S.C. § 763(a) (Supp. IV 1980).

[13] Many admiralty cases may be found in which actions were allowed long after the analogous statute of limitations had expired. *See* Kelly v. Smith, 485 F.2d 520, 526 (5th Cir. 1973) (principle of laches applied to allow five-year old cause of action barred by state one-year statute of limitations).

does not apply to admiralty.[14] It should be apparent that it will not be uncommon for these differences to be outcome-determinative in certain cases.[15]

The framers of the Constitution of the United States recognized a need for a strong court of admiralty to ensure a centralized, uniform regulation of maritime commerce and navigation.[16] Article III, section 2, of the Constitution,[17] adopted with almost no comment or debate,[18] extended the federal judicial power to all cases of maritime and admiralty jurisdiction. The Judiciary Act of 1789[19] effectuated this jurisdictional grant by vesting in the federal district courts original subject matter jurisdiction of all admiralty and maritime actions.[20] The "saving to suitors" clause,[21] however, preserved the authority of common law courts to hear cases of a maritime nature.[22] Initially, federal courts

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[14] *See* Waring v. Clarke, 46 U.S. (5 How.) 441, 459-60 (1847) (no provision in Constitution from which it can be inferred that civil causes in admiralty were to be tried by a jury).

[15] *See infra* notes 30, 52.

[16] *See generally* Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 261 (1950) (leading reason for establishment of admiralty jurisdiction was national interest in uniform judicial supervision of maritime industry); Stolz, *supra* note 10, at 670 (much of justification for federal jurisdiction in admiralty was protection of merchants by having uniform law administered by federal courts); Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L. REV. 123, 124 (1925) (admiralty law found justification in desirability of uniform law applicable to maritime enterprises and transactions).

[17] U.S. CONST. art. III, § 2, states, "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

[18] Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 460 (1925).

[19] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76 (codified as amended at 28 U.S.C. § 1333(1) (1976)).

[20] 28 U.S.C. § 1333(1) (1976).

[21] *Id.* This clause originally read "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." *Id.* The clause now reads: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." *Id.* The new language of the clause is explained in the Historical and Revision Notes as being "simple and more expressive of the original intent of Congress and is in conformity with Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity." *Id.*

[22] The Supreme Court has held that the only remedy exclusively within federal admiralty jurisdiction is one in rem. *See* The Moses Taylor, 71 U.S. (4 Wall.) 411, 427 (1866) (striking a California statute allowing state courts to proceed in rem). Certain maritime actions created by federal statutes may be brought only in federal admiralty courts. *See, e.g.*, Death on the High Seas Act, 46 U.S.C. § 761 (1976); Ship Mortgage Act, 46 U.S.C. § 951 (1976).

interpreted their grant of admiralty jurisdiction as extending only to the sea[23] and those waters within the "ebb and flow of the tide."[24] As the country's territorial boundaries were expanded and trade on inland waterways increased, the reach of admiralty jurisdiction was extended.[25] *The Plymouth*[26] firmly established what came to be known as the "strict locality" rule of maritime tort jurisdiction.[27] In *The Plymouth*, the Supreme Court determined that only those torts actually occurring on the high seas or navigable waters were cognizable in admiralty.[28] The "strict locality" rule expressed in *The Plymouth* was

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Prior to 1917, courts generally approached maritime cases as if there were two separate and independent systems of law: general maritime law to be applied in federal admiralty courts and state common law to be applied in state courts. For example, in Belden v. Chase, 150 U.S. 674 (1893), the Supreme Court sustained an application of the New York contributory negligence rule to a collision suit that was brought in a New York state court. *Id.* at 691. Under this approach, the "remedy" saved by the "saving to suitors" clause was the state-created right upon which the plaintiff based his claim. In Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), however, the Supreme Court announced the doctrine that the general maritime law is paramount and exclusive in all maritime cases. *Id.* at 215. One consequence of this doctrine is that the same rule must be applied regardless of the choice of forum, state or federal. *Id.* This means that whenever federal admiralty law is applicable, state law-making bodies are constitutionally disabled from declaring the substantive rule that will control the result. *Id.* at 216; *see also* Kermarec v. Campagnie Generale Transatlantique, 358 U.S. 625, 628 (1959); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 410 (1953). This doctrine has been labeled "reverse-Erie." D. ROBERTSON, ADMIRALTY AND FEDERALISM 188 (1970).

[23] *See* DeLovio v. Boit, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3,376). In *DeLovio* the court stated the bounds of federal admiralty jurisdiction: ["Federal admiralty jurisdiction] comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." *Id.*

[24] The Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825); *see* Waring v. Clarke, 46 U.S. (5 How.) 441, 464 (1847).

[25] In the Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454 (1851), the Supreme Court determined that there was nothing in the ebb and flow of the tide that makes waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that makes them unfit. If it is a public navigable water, on which commerce is carried, there is a sound reason to subsume the waters under admiralty jurisdiction. *Id.*

[26] 70 U.S. (3 Wall.) 20 (1865). In *The Plymouth*, plaintiff's wharf buildings were damaged by fire originating aboard a docked ship; the Court refused to grant admiralty jurisdiction. *Id.*

[27] Comment, *Admiralty Jurisdiction: Pleasure Crafts and Maritime Nexus*, 12 CAL. W.L. REV. 535, 539 (1976).

[28] 70 U.S. at 36. The Court held that "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *Id.*

initially accepted,[29] but its mechanical application produced seemingly irreconcilable decisions based on attenuated distinctions.[30] It consequently engendered frequent criticism by commentators[31] as well as legislative[32] and judicial modifications.[33]

Eventually, the problems associated with the application of the "strict locality" rule caused some courts to move to a "locality plus" test.[34] In *McGuire v. City of New York*,[35] the United States District Court for the Southern District of New York held that an action for injuries sustained by a swimmer at a public beach was not within admiralty jurisdiction because admiralty law historically was not concerned with noncommercial activities.[36] In adopting a locality plus maritime nexus test,[37] the court stated that the occurrence of a tort on navigable waters was only prima facie evidence of admiralty jurisdic-

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[29] *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 n.2 (1971) (Court cited 39 cases applying "strict locality" rule to support its determination that jurisdiction was lacking in action brought by longshoreman injured on pier).

[30] *Compare* T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 182 (1928) (no admiralty jurisdiction when longshoreman knocked from wharf into navigable water), *with* Minnie v. Port Huron Terminal Co., 295 U.S. 647, 649 (1935) (admiralty jurisdiction proper when longshoreman knocked from ship in navigable water onto wharf).

[31] *See* Black, *supra* note 16, at 264; Stolz, *supra* note 10, at 665; Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 COLUM. L. REV. 1084, 1091 (1964).

[32] The Extension of Admiralty Act, 46 U.S.C. § 740 (1976), obviated the specific holding of *The Plymouth* by providing in part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consumated on land." 46 U.S.C. § 740 (1976).

[33] *See* Campbell v. H. Hackfield Co., 125 F. 696, 697 (9th Cir. 1903) (construed *The Plymouth* to require that tort have maritime nature before action brought in admiralty).

[34] "Locality plus" is the term used to describe the rule that states that in addition to a maritime locality, some other maritime relationship must exist with the tort in order to exercise admiralty jurisdiction. *See, e.g.*, Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 966 (6th Cir. 1967); McGuire v. City of New York, 192 F. Supp. 866, 870 (S.D.N.Y. 1961).

One commentator suggests that early cases employing the "strict locality" rule would have satisfied the "locality plus" standard and that a maritime connection was sub silentio a coordinate basis of jurisdiction. Comment, *supra* note 31, at 1091.

[35] 192 F. Supp. 866 (S.D.N.Y. 1961).

[36] *Id.* at 870-71. The court pointed out that the locality test was developed as a rule of limitation and as a means of limiting the scope of admiralty jurisdiction; thus the plaintiff should not be able to expand jurisdiction through its use. *Id.* at 869.

[37] The court stated: "Not every tort committed on admiralty waters may be redressed in the admiralty courts. Only those which have a maritime character, which deal with a maritime subject matter, are properly within admiralty jurisdiction." *Id.* at 879.

tion.[38] Similarly, in *Chapman v. City of Grosse Pointe Farms,*[39] the Sixth Circuit held that in addition to a maritime locality, admiralty jurisdiction requires a relationship between the alleged wrong and some maritime service, navigation, or commerce on navigable waters.[40]

Despite these rejections of the "strict locality" rule, the Supreme Court nevertheless adhered to the rule as late as 1971, when the rule was used to determine that a longshoreman, injured on a pier, was not within admiralty jurisdiction.[41] Just one year later, in *Executive Jet Aviation, Inc. v. City of Cleveland,*[42] the Supreme Court was once again called upon to review the issue of admiralty tort jurisdiction. *Executive Jet* involved a claim against an airport when a plane had, on takeoff, ingested seagulls into its engine, crashed, and sunk in Lake Erie.[43] In affirming the dismissal of the action, the Court noted the inconsistencies produced by the "strict locality" rule[44] and suggested that, notwithstanding certain language in cases like *The Plymouth,*

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[38] *Id.*

[39] 385 F.2d 962 (6th Cir. 1967). *Chapman* involved a suit in admiralty for injuries sustained by plaintiff when he dove from the side of a pier into 18 inches of water. *Id.* at 962.

[40] *Id.* at 966.

[41] Victory Carriers, Inc. v. Law, 404 U.S. 202, 211 (1971). In *Victory Carriers*, the Court concluded that if denying remedies to longshoremen injured on land was intolerable, Congress had the power to enact a suitable solution. *Id.* at 216.

Less than one month after the Supreme Court's decision in *Victory Carriers* was rendered, the Fifth Circuit rejected the "strict locality" test for admiralty subject matter jurisdiction in favor of a more restrictive standard requiring that the tort have a maritime locality and a "substantial connection with maritime activities or interests." Peytavin v. Government Employees Co., 453 F.2d 1121, 1127 (5th Cir. 1972).

[42] 409 U.S. 249 (1972).

[43] *Id.* at 250. In an unreported opinion, the District Court for the Northern District of Ohio relied on *Chapman v. City of Grosse Pointe Farms* to dismiss the suit, because it found no relationship between the wrong and some maritime service, navigation, or commerce on navigable waters. 409 U.S. at 251. On appeal, the Sixth Circuit did not consider the question of maritime relationship, but affirmed the district court on the ground that "the alleged tort in this case occurred on land before the aircraft reached Lake Erie . . . . " Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 154 (6th Cir. 1971), *aff'd*, 409 U.S. 249 (1972).

Prior to *Executive Jet*, the Third Circuit had held that an action resulting from the crash of an airplane on navigable waters was within admiralty jurisdiction because the tort had a maritime locality. Weinstein v. Eastern Airlines, Inc., 316 F.2d 758, 766 (3rd Cir.), *cert. denied*, 375 U.S. 940 (1963).

[44] 409 U.S. at 255. The Court cited several cases in which admiralty jurisdiction had been exercised by a mechanical application of the "strict locality" rule, but which the Court deemed "almost absurd." *Id.* at 255-56. *See, e.g.,* Davis v. City of Jacksonville Beach, 251 F. Supp. 327, 328 (M.D. Fla. 1965) (injury to a swimmer by a surfboard); King v. Testerman, 214 F. Supp. 335, 336 (E.D. Tenn. 1963) (injuries to a water skier).

maritime locality had never explicitly been adopted as the sole test of admiralty jurisdiction.[45] The Court broke with a century and a half of precedent when it concluded that it was more consistent with the history and purpose of admiralty to require, in addition to maritime locality, that the wrong bear a "significant relationship to traditional maritime activity."[46] Although the Court expressly limited its holding to the jurisdictional status of aviation accidents occurring on or over navigable waters,[47] the Court's rationale has been given a much broader interpretation and application by the lower courts.[48]

The lower courts have had considerable difficulty in interpreting the "significant relationship" requirement of *Executive Jet*[49] and, particularly, in applying this requirement to pleasure boat accidents.[50]

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[45] 409 U.S. at 258.

[46] *Id.* at 268.

[47] *Id.* The Court stated, "We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary."*Id.*

[48] *See* 7A J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 325[3], at 191-99 (Supp. 1981-1982).

[48] *See* Comment, *supra* note 27, at 550 n.99 (the strength of *Executive Jet* is that it posed no pat nexus criteria).

[50] For illustrations of pleasure boat accidents determined to be within admiralty jurisdiction, see Otto v. Alper, 489 F. Supp. 953, 955 (D. Del. 1980); Wolff v. Whittaker Marine & Mfg. Co., 484 F. Supp. 1021, 1023 (E.D. Mo. 1979); Armour v. Gradler, 448 F. Supp. 741, 744 (W.D. Pa. 1978); Gilmore v. Witschorek, 411 F. Supp. 491, 494 (E.D. Ill. 1976); Kayfetz v. Walker, 404 F. Supp. 75, 77 (D. Conn. 1975); Banchi v. Miller, 388 F. Supp. 645, 646 (E.D. Pa. 1974).

For illustrations of pleasure boat accidents held not to be within admiralty jurisdiction, see Hall v. Robinson, 495 F. Supp. 123, 124 (E.D. Tenn. 1980); Marroni v. Matey, 492 F. Supp. 340, 341 (E.D. Pa. 1980); Jorsch v. LeBeau, 449 F. Supp. 485, 487 (N.D. Ill. 1978); Roberts v. Grammer, 432 F. Supp. 16, 18 (E.D. Tenn. 1977); Webster v. Roberts, 417 F. Supp. 346, 347 (E.D. Tenn. 1976).

Commentators have been critical of the exercise of admiralty jurisdiction over pleasure boating accidents. *See generally* 7A MOORE, *supra* note 48, ¶ 325[3], at 198 (Supp. 1981-1982) (difficult to see how including pleasure boating incidents in admiralty fulfills basic purposes of admiralty jurisdiction); Stolz, *supra* note 10, at 664 (chief objection to applicaton of admiralty to pleasure boating is that it prohibits exercise of state legislative power in area in which local legislatures have been thought competent and which Congress cannot be expected to be interested in, or responsive to, local needs); Comment, *supra* note 27, at 535 (pleasure boating claims are not within traditional scope of maritime jurisdiction, and it is unreasonable for federal forums to hear them); Comment, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard*, 34 WASH. & LEE L. REV. 121, 139 (1977) (tortious activity of vessels on navigable waters having no connection with historical function of admiralty should be excluded). *But cf.* Comment, *supra* note 9, at 579 (valid federal interest in pleasure boating because accidents may obstruct commerce); Note, *supra* note 10, at 953 (uniformity with respect

Kelly v. Smith[51] presented the Fifth Circuit with the problem of what constitutes a sufficient relationship to maritime activity to warrant admiralty jurisdiction. *Kelly* involved the claims of two poachers injured in an exchange of rifle fire while fleeing a Mississippi River island hunting preserve in their small boat.[52] The court applied the "locality plus" test of *Executive Jet*,[53] and discerned from that decision and its own Fifth Circuit precedent[54] that the sufficiency of a maritime relationship depends upon the following: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of the injury; and (4) the traditional concepts of the role of admiralty.[55] After reviewing the facts of the case in light of these four factors, the court held that the situation in question presented a threat to maritime commerce sufficient to sustain admiralty jurisdiction.[56]

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to navigation rules and regulations desirable to prevent confusion).

[51] 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

[52] 485 F.2d at 521. Since the action was brought more than five years after the accident, the court noted that it was crucial to find admiralty jurisdiction if plaintiff were to receive any remedy at all. *Id.* at 523. If jurisdiction was sustainable only on diversity grounds, the one-year Mississippi statute of limitations for assault and battery would have barred the suit, but under general maritime law the doctrine of laches would have allowed it. *Id.* at 523, 526.

[53] *Id.* at 525.

[54] Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972). *Peytavin* involved an automobile collision on a floating pontoon at a ferry landing on the Mississippi River. *Id.* at 1122. After determining that the accident had occurred on navigable water, the Fifth Circuit held that this alone was not enough to sustain admiralty jurisdiction. *Id.* at 1126-27. The court stated: "Both parties were engaged in the use of the facilities which are connected with maritime commerce at the time of the accident. But neither the parties, nor the nature or the apparent cause of the accident, nor the injury sustained demonstrates any further connection with maritime activities or interests." *Id.* Without this connection, the court held that admiralty jurisdiction was improper. *Id.* at 1127.

[55] 485 F.2d at 525.

[56] *Id.* at 526. The court thus rejected the view that the activities of the parties must have an actual impact on maritime navigation, in favor of a potential impact test. *Id.*

In dissent, Judge Morgan thought the case raised a problem of federalism. Since state law provided adequate remedies under the circumstances, he applied an interest analysis test and found that there was no sufficient reason to allow federal law to displace state law. *Id.* at 527.

Kelly has been frequently criticized. *See generally* Swaim, *Admiralty: The Fifth Circuit "Returned to Navigation"*, 19 LOY. L. REV. 617, 636 (*Kelly* merely pays lip service to "locality plus" and has actually reverted to "strict locality"); Comment, *supra* note 27, at 546 (*Kelly* supplied clear and rational test, but reached irrational result); Comment, *Admiralty Tort Jurisdiction-Tort Claims Not Within Admiralty Jurisdiction Unless Requisite Maritime Nexus Exists*, 27 VAND. L. REV. 343, 356 (criticizing empha-

Other circuits have followed the rationale of the *Kelly* decision. For example, in *St. Hilaire Moye v. Henderson*,[57] the Eighth Circuit considered a claim arising from the alleged negligence of a motorboat operator that resulted in injury to a passenger.[58] The court determined that the use of a waterborne vessel on navigable waters falls appropriately within the historical scope of admiralty law.[59] Expressing approval of the criteria established in *Kelly*, the court assumed that noncommercial navigation on navigable waters presents a potential danger to the operation of vessels engaged in commerce on those waters.[60] The Eighth Circuit did not limit its holding to the facts of the case, but concluded that all vessels, regardless of size or activity, meet the maritime relationship test when operated on navigable waters.[61]

The issue of navigability, as it relates to admiralty jurisdiction over pleasure boat accidents, was treated as a threshold question by the Ninth Circuit in *Adams v. Montana Power Co.*[62] The *Adams* court indirectly considered the relationship of pleasure boats with traditional maritime concerns as an essential element in determining whether the locality of the tort was on navigable waters.[63] The Ninth Circuit denied admiralty jurisdiction because it determined that the pleasure boat accident in question occurred on a nonnavigable portion of the Missouri River.[64] Although the court acknowledged the navigability of the river for commerce clause purposes,[65] it distinguished the purposes served

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sis on locality).

[57] 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1974).

[58] 496 F.2d at 975. The accident occurred on the Arkansas River. *Id.*

[59] *Id.* at 979. In support of its position the court cited Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973), in which the court held that damages for physical injuries to maritime vessels and interference with their right of navigation presented a significant relationship to traditional maritime concerns so as to sustain admiralty jurisdiction. *Id.* at 257.

[60] 496 F.2d at 978-79. *But see* Comment, *supra* note 27, at 548 n.85 (criticizing "potential danger" argument).

[61] 496 F.2d at 979. This jurisdictional inquiry was outcome determinative. *See supra* note 9 and accompanying text.

[62] 528 F.2d 437 (9th Cir. 1975). *Adams* involved the drowning death of a pleasure boater on a stretch of the Missouri River, which was obstructed at both ends by dams and therefore no longer used for commercial traffic. *Id.* at 439. The district court dismissed the claim for lack of admiralty jurisdiction because the stretch of river where the tort occurred was not in fact used for traditional maritime activities. Adams v. Montana Power Co., 354 F. Supp. 1111, 1113 (D. Mont. 1973), *aff'd*, 528 F.2d 437 (9th Cir. 1975). *See generally* 44 MISS. L.J. 1013, 1013-16 (1973).

[63] 528 F.2d at 439.

[64] *Id.* at 441.

[65] *Id.* at 440. Congress was empowered under the commerce clause, U.S. CONST. art.

by that clause and those served by admiralty jurisdiction.[66] Thus, the Ninth Circuit did not consider directly the applicability of a maritime relationship, but did determine, in the context of navigability, that admiralty jurisdiction should extend only to those waters that, in their present condition, sustain, or could sustain, commercial traffic.[67]

The Fourth Circuit considered the problem whether pleasure boating fell within admiralty jurisdiction in *Richards v. Blake Builders Supply*,[68] which joined cases dealing with two separate boating accidents.[69] The court reluctantly held that, although there were several policy reasons[70] for not extending admiralty jurisdiction to pleasure boat cases, it could not interpret *Executive Jet* as overruling prior precedent regarding the inclusion of pleasure craft in admiralty jurisdiction.[71] In an effort to line up the extension of admiralty in *Richards*

I, § 8, cl. 3, to regulate waterways of the United States that are navigable in interstate or foreign commerce. Any waterway that is used or susceptible to being used in its ordinary condition as a highway of commerce is navigable for commerce clause purposes. *See* The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (judicial definition of navigable waters for commerce clause purposes); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 171-72 (1979) (distinguishing "navigability" under the commerce clause from its application to admiralty jurisdiction). Subsequent construction of a waterway once found navigable for commerce clause purposes does not alter that status. Economy Light & Power Co. v. United States, 256 U.S. 113, 118 (1921). Further, waters may be found navigable under the commerce clause even if artificial improvements are required to make the waterway suitable for commerce. United States v. Appalachian Power Co., 311 U.S. 377, 407 (1940).

[66] 528 F.2d at 440. The court reasoned that the commerce power was designed "to preserve and protect the nation's waterways which, in their natural condition are navigable in interstate commerce," but concluded that the definition of navigability for admiralty jurisdiction need not to be the same. *Id.* The court went on to say that only the burdening of federal courts and the frustrating of the purposes of state tort law would be served by the exercise of admiralty jurisdiction over the activities and disputes of pleasure boaters on waters devoid of trade and commerce. *Id.* at 440-41.

[67] *Id.*; *see* Livingston v. United States, 627 F.2d 165, 170 (8th Cir. 1980) (admiralty jurisdiction turns on navigability in fact), *cert. denied*, 450 U.S. 914 (1981); Chapman v. United States, 575 F.2d 147, 151 (7th Cir.) (waters not navigable for admiralty purposes when not used for commercial navigation and not susceptible to such use in present state), *cert. denied*, 439 U.S. 893 (1978).

[68] 528 F.2d 745 (4th Cir. 1975).

[69] The Virginia cases arose out of the explosion of a motorboat while being operated on Lake Gaston, a man-made lake on the Roanoke River. The North Carolina case involved a boat that crashed into the bank of the Cape Fear River. The court acknowledged that both accidents occurred on navigable waters. There was reference to commercial activity on the Cape Fear River, but no substantial commercial activity on Lake Gaston. *Id.* at 746-47.

[70] *Id.* at 748.

[71] *Id.* The precedent referred to by the court was that group of cases in which the

with the maritime nexus rationale of *Executive Jet*, the Fourth Circuit pointed out that the pleasure boats were vessels in navigation and the controversy arose out of their navigation.[72] Thus, the court found a maritime connection in *Richards* not present in *Executive Jet*.[73]

In the instant case, the Supreme Court reasoned that since *Executive Jet*'s rejection of the "strict locality" rule was applicable to determinations of federal admiralty jurisdiction outside the field of aviation torts, the instant tort must have had a significant relationship to traditional maritime concerns in order to bring it within admiralty subject matter jurisdiction.[74] Despite this determination, the Court concluded that there was a need for uniform rules of conduct for all operators of vessels on navigable waters[75] and that the collision of pleasure boats on navigable waters presented a potential disruptive impact on maritime commerce.[76] Since the application of the "strict commercial" rule would have lead to inconsistent findings or denials of admiralty jurisdiction,[77] the court found that the instant collision between two plea-

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Supreme Court assumed that admiralty jurisdiction included the operation of pleasure craft on navigable waters. *See, e.g.*, Levinson v. Deupree, 345 U.S. 648, 649-52 (1953); Coryell v. Phipps, 317 U.S. 406, 407 (1943); Just v. Chambers, 312 U.S. 383, 384 (1941). The *Richards* court reasoned that since *Executive Jet* dealt with an aviation tort, it could not be interpreted to overrule the prior decisions allowing admiralty jurisdiction in pleasure boat cases. 528 F.2d at 749.

The Fourth Circuit reconciled its decision in *Richards* with Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973), by noting that the Supreme Court had expressly disapproved a finding of admiralty jurisdiction in waterskiing cases similar to *Crosson*. 528 F.2d at 748. *See Executive Jet*, 409 U.S. at 256 (criticizing extension of admiralty over injuries to water skiers).

[72] 528 F.2d at 749.

[73] *Id.* The Fourth Circuit demonstrated reservations with its holding in *Richards* by asserting that the need for uniform rules concerning pleasure craft could be fulfilled by state courts, as well as by federal judges. 528 F.2d at 747. The court also suggested a possible need for congressional attention to the matter of admiralty jurisdiction over pleasure boats. *Id.* at 748. The Congress, the court reasoned, could tailor the jurisdiction to the need, relinquishing to the states the controversies that would be better handled there, while retaining for federal admiralty jurisdiction those controversies for which it is better equipped. *Id.*

[74] Foremost Ins. Co. v. Richardson, 102 S. Ct. 2654, 2658 (1982).

[75] *Id.* at 2659. The Court stated that the federal interest in protecting maritime commerce could not be adequately served if admiralty jurisdiction was limited to the individual actually engaged in commercial maritime activity. *Id.*

[76] *Id.* The Court reasoned that if the collision between the two boats had occurred at the mouth of the St. Lawrence Seaway, there would have been a substantial effect on maritime commerce, without regard to whether either boat was, or had been previously, actively engaged in commercial activity. *Id.* The Court cited this concern as a compelling factor in its conclusion. *Id.*

[77] *Id.* The "strict commercial" rule, the Court reasoned, "would promote the use of

sure boats on navigable waters had a sufficient nexus to traditional maritime activity to warrant invocation of federal admiralty jurisdiction.[78]

In a strongly worded dissent,[79] Justice Powell[80] argued that since the instant case involved only pleasure craft, neither of which had ever been used in any commercial activity, there was no connection between the tort and any historical admiralty interest.[81] Justice Powell concluded that state courts could have just as easily applied federal, as well as local, uniform rules of conduct[82] and that *Executive Jet* made it clear that a potential disruption of traffic on navigable waters was not enough to justify the exercise of admiralty jurisdiction.[83] He would

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fortuitous circumstances," such as whether the boat was, or had ever been, rented, in determining admiralty jurisdiction. *Id.* Prior decisions of the Supreme Court, as well as congressional activity, were found to be consistent with the *Foremost* holding. *Id.* at 2657-59.

[78] *Id.* at 2660.

[79] Justice Powell criticized the holding of the Court as extending admiralty jurisdiction to the "edge of absurdity." *Id.* at 2661. In the Fifth Circuit, Judge Thornberry's dissent was sympathetic with the district court's holding that "pleasure boating is not the stuff of which admiralty jurisdiction should be made." 641 F.2d at 317. His dissent, however, recognized that since the Fifth Circuit had already decided, in Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), that noncommercial activity does fall within admiralty jurisdiction, the question was closed. 641 F.2d at 317. Judge Thornberry noted that *Kelly*, because it found admiralty jurisdiction based on the occurrence of the tort on a major commercial artery posing a potential danger to maritime commerce, had preserved the requisite nexus to commercial activity. *Id.* He found no such danger in the *Foremost* case and "thus no trace of any federal interest at stake." *Id.* Finally, Judge Thornberry stated his belief "that the desire for certainty cannot alone justify the assumption of federal control over matters of purely local concern." *Id.* (citing Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975)). He would have remanded the case for determination whether the part of the river where the accident occurred functioned as a commercial artery. 641 F.2d at 317.

[80] The Chief Justice, Justice Rehnquist, and Justice O'Connor joined in the dissent. 102 S. Ct. at 2660.

[81] *Id.* at 2661. Justice Powell recognized the jurisdictional issue before the Court as relatively new and one that had not been addressed by the Supreme Court. He criticized the majority's reliance on cases apparently involving pleasure boats in which the jurisdictional question was not at issue. *Id.* at 2662 n.5. Justice Powell cited Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974), which had determined that when jurisdictional questions have been passed on sub silentio in a case, the Supreme Court had never considered itself bound by that case when a subsequent case brought the jurisdictional issue squarely before the Court.

[82] 102 S. Ct. at 2662.

[83] *Id.* at 2663. Justice Powell reasoned that if a potential disruption of traffic on navigable waters was a sufficient connection with traditional maritime concerns, the airplane crash in *Executive Jet* would have supported admiralty jurisdiction. 102 S. Ct. at 2663. Justice Powell found further that the Court's reasoning on this point, in essence,

not, therefore, have extended federal admiralty jurisdiction to the instant case.[84]

By holding that a collision between pleasure boats on navigable waters has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction,[85] the Supreme Court has misinterpreted the *Executive Jet* decision. Although its opinion in the instant case purported to adopt the "traditional maritime activity" test of *Executive Jet*,[86] the majority neglected the historical purpose of admiralty jurisdiction[87] by holding that the "maritime activity" need not be a commercial one.[88] Also, even though the *Executive Jet* decision effectively limited admiralty jurisdiction by its rejection of the "strict locality rule,"[89] the instant case has extended admiralty beyond its traditional and proper scope.[90]

The majority attempted to justify its decision by pointing out the following factors: (1) the need for uniform rules of navigation;[91] (2) the potential disruptive impact on commerce when two vessels collide on navigable waters;[92] and (3) the uncertainty that would accompany a jurisdictional test tied to the commercial use of a given boat.[93] When examined closely, however, these factors provide little support for the Court's conclusion. As Justice Powell's dissent pointed out, the majority's desire to maintain uniform rules governing navigation is not sufficient to justify the extension of admiralty jurisdiction to cover the activity of small pleasure craft,[94] because the application of "uniform rules of conduct"[95] to pleasure boating could just as easily be done by state courts.[96] The majority's "potential disruptive impact" argument[97]

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resurrected the "strict locality" rule that *Executive Jet* rejected, because any accident that occurs on navigable waters has a "potential disruptive impact" on commercial traffic. 102 S. Ct. at 2663.

[84] 102 S. Ct. at 2664.

[85] *Id.* at 2658.

[86] *Id.*

[87] The Court admitted that the primary focus of admiralty jurisdiction is the protection of maritime commerce, but argued that the federal interest in protecting maritime commerce could not be adequately served if admiralty jurisdiction were restricted to individuals actually engaged in commercial maritime activity. *Id.* at 2658-59.

[88] *Id.* at 2658.

[89] *See supra* text accompanying notes 42-45.

[90] *See supra* note 16 and accompanying text.

[91] 102 S. Ct. at 2659.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 2662.

[95] *Id.* at 2659.

[96] *See supra* text accompanying note 82.

is weakened by the fact that virtually every accident on navigable waters presents a "potential disruptive impact" on commercial activity.[98] As the dissent pointed out, this argument has, in essence, resurrected the "strict locality" rule that was rejected by *Executive Jet*.[99] The Court's contention that confusion would accompany a jurisdictional test tied to the commercial use of a boat[100] is also difficult to support. In light of the many jurisdictional determinations made by state and federal courts, it is hard to imagine that any court would have difficulty in determining whether the boating activity at issue was for pleasure or commercial purposes.[101]

Although the arguments in favor of the extension of admiralty jurisdiction to pleasure boating activity are relatively weak, there are a number of compelling reasons for rejecting this jurisdictional extension. It is a simple fact that the operation of pleasure boats has no connection with the historical purpose of admiralty jurisdiction.[102] The body of federal maritime law, which must be applied once admiralty jurisdiction is invoked,[103] was formulated to resolve disputes arising in a commercial context. Applying this law to garden variety torts committed on water may prompt an erosion of admiralty jurisprudence as it pertains to the commercial context; thus undermining the most important function this law serves.[104] To include pleasure boating accidents within federal admiralty jurisdiction intrudes on state authority and may encumber the federal judicial docket needlessly.[105] Pleasure boating is a basically recent phenomena,[106] and it is difficult to imagine that the drafters of the Constitution envisioned the extension of admiralty jurisdiction to cover the activities of small pleasure craft.

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[97] 102 S. Ct. at 2659.

[98] *See supra* note 83 and accompanying text.

[99] 102 S. Ct. at 2663.

[100] *Id.* at 2659.

[101] In his dissent Justice Powell stated: "In view of the myriad of definitional tasks performed regularly by state and federal courts, determining in a particular case whether the boating at issue is essentially for pleasure rather than commerce rarely would present a difficult problem for any court." *Id.* at 2663 n.7.

[102] *Id.* at 2661; *see also* Stolz, *supra* note 10, at 667 (civil jurisdiction of admiralty was historically concerned exclusively with matters arising from maritime commerce).

[103] *See* Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) (general maritime law is paramount and exclusive and must be applied in admiralty cases regardless of forum); *see supra* note 22.

[104] Stolz argues persuasively that the law of pleasure boating will develop faster and more rationally if left to the state courts. Stolz, *supra* note 10, at 719.

[105] 102 S. Ct. at 2664.

[106] Stolz, *supra* note 10, at 661.

Significantly, the Court failed to couch this extension of admiralty jurisdiction in consitutional terms. It would seem that this failure, to even allude to a constitutional basis for this extension, is no accident. It is fair to assume that *Foremost* is merely the Court's construction of section 1333(1).[107] Given the fact that the Court has not found this extension to be mandated by the Constitution, but merely permissible as a result of a carelessly drawn statute, it would seem that the most expeditious remedy for this unwarranted extension of admiralty jurisdiction is to be found with Congress. Through simple statutory modification, Congress would appear to be able to correct this misapplication of admiralty jurisdiction and once again situate admiralty jurisdiction within its proper bounds.

J. Carter Thompson, Jr.

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[107] 28 U.S.C. § 1333(1) (1976).

Bankruptcy—Chapter 13—Good Faith Requirement Does Not Require Substantial Repayment of Unsecured Creditors

Plaintiffs[1] filed a petition in the United States Bankruptcy Court for the Southern District of California under Chapter 13[2] of the Bankruptcy Code[3] and, pursuant to the provisions of that chapter, submitted to the court for confirmation a proposed plan for repayment of their debts.[4] Under this plan secured and priority creditors would have been fully repaid, but unsecured creditors would have been repaid only one percent of the amount of their claims.[5] The court refused to confirm the plan, reasoning that since plaintiffs did not intend to substantially repay their unsecured creditors and since the primary purpose of the plan was to allow plaintiffs to defer payment of delinquent taxes,[6]

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[1] Plaintiffs were Julian Roosevelt and Jane Alma Goeb. Goeb v. Heid (*In re* Goeb), 675 F.2d 1386, 1386 (9th Cir. 1982).

[2] Chapter 13 is titled Adjustment of Debts of an Individual with Regular Income and is codified at 11 U.S.C. §§ 1301-1330 (Supp. III 1979). To qualify for Chapter 13 relief, a debtor must: "1) be an individual with a 'regular income' as defined by 11 U.S.C. § 101(24) (Supp. III 1979); 2) have non-contingent, liquidated unsecured debts of less than $100,000; and 3) have non-contingent, liquidated secured debts of less than $350,000." 11 U.S.C. § 109(e) (Supp. III 1979).

For debtors who qualify, Chapter 13 provides an alternative to the straight liquidation procedure of Chapter 7, as codified at *Id.* §§ 701-766. In a Chapter 13 proceeding the debtor proposes a plan for repayment of his debts and submits it to the court for confirmation. *Id.* §§ 1321-1325. Creditors are given the opportunity to object to the plan. *Id.* § 1324. If the plan is confirmed and the debtor successfully completes payments under it, he is discharged from the debts covered by the plan. *Id.* § 1328. For a complete discussion of the mechanics of Chapter 13, see W. Phillips, Adjustment of Debts of an Individual with Regular Income-Chapter 13 Title I Federal Bankruptcy Act, §§ 3-1 to 3-4, 5-1 to 5-12, 19-1 to 19-14 (1979).

[3] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified primarily in 11 U.S.C. and scattered sections of 28 U.S.C. (Supp. III 1979)).

[4] *In re* Goeb, 4 Bankr. 735, 736 (Bankr. S.D. Cal. 1980), *rev'd sub nom.* Goeb v. Heid (*In re* Goeb), 675 F.2d 1386 (9th Cir. 1982).

[5] *Id.* The proposed plan was for a five year term, the maximum allowable under Chapter 13. The plaintiffs had the following outstanding debts: (1) $64,967 to secured trust-deed holders; (2) $11,851 to priority creditors, consisting primarily of unpaid taxes on an unsuccessful business venture; and (3) $26,597 to unsecured creditors. Goeb v. Heid (*In re* Goeb), 675 F.2d 1386 (9th Cir. 1982).

[6] *In re* Goeb, 4 Bankr. at 736-37. The bankruptcy court noted that the basic purpose of Chapter 13 is to allow an individual to make payments to all creditors in a reasonable fashion under a plan that is fair and equitable in light of the debtor's circumstances. In the present case, the plaintiffs' plan proposed to pay priority tax claims over a period of four years and, then, after payment of the priority claims, proposed to pay

the plan had not been proposed in good faith as required by section 1325(a)(3) of chapter 13.[7] On appeal, the United States Court of Appeals for the Ninth Circuit, *held*, reversed and remanded.[8] Satisfaction of the good faith requirement of section 1325(a)(3) is not conditioned on substantial repayment of unsecured creditors, and the proper inquiry for a court to make in determining good faith is whether the debtor has acted equitably in proposing his plan in light of all relevant circumstances. *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386 (9th Cir. 1982).

A legal procedure allowing insolvent debtors to repay their debts out of future income by means of a repayment plan has been available

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unsecured claims one cent on the dollar. 4 Bankr. at 736-37. The court concluded that because the Goebs elected to proceed under Chapter 13 to take advantage of the subsidiary feature of deferment of back taxes and to avoid repayment of unsecured creditors, the proposal did not deal fairly and equitably with all creditors in accordance with the purpose of Chapter 13. The court therefore denied confirmation of the plan. *Id.*

[7] *Id.* Section 1325(a) sets forth the requirements for a plan to be confirmed:

> (a) The court shall confirm a plan if-
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> (1) the plan complies with the provisions of this chapter and with other applicable provisions of this title; (2) any fee, charge, or amount required under chapter 123 of Title 28, or by the plan, to be paid before confirmation, has been paid; (3) *the plan has been proposed in good faith and not by any means forbidden by law*; (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 of this title on such date; (5) with respect to each allowed secured claim provided for by the plan—
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> (A) the holder of such claim has accepted the plan; (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or (C) the debtor surrenders the property securing such claim to such holder; and
>
> (6) the debtor will be able to make all payments under the plan and to comply with the plan.

11 U.S.C. § 1325(a) (Supp. III 1979) (emphasis added).

For discussion of § 1325(a)(3), *see infra* note 23 and accompanying text.

[8] 675 F.2d at 1391. The court found that although the plaintiffs' reasons to proceed under Chapter 13—to take advantage of the deferral of back taxes and to avoid substantial repayment to unsecured creditors—were relevant to determine whether the plan was proposed in bad faith, they were not determinative. Finding the bankruptcy court had relied solely on these two considerations in its determination of bad faith, the court reversed and remanded. In remanding the case, the court stated, "Unless the court can muster other evidence of bad faith on remand, it must confirm the [plaintiffs'] proposed plan." *Id.*

since 1938, when the provisions of Chapter XIII were enacted as part of the Chandler Act.[9] Chapter XIII, however, was used in very few jurisdictions,[10] in part because of its restrictive eligibility and payment provisions.[11] The revised version of Chapter XIII was enacted as part of the Bankruptcy Reform Act of 1978[12] and was intended to remedy earlier problems by encouraging debtor use of repayment plans as an alternative to straight liquidation bankruptcy under Chapter 7.[13] To

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[9] Chandler Act, ch. 575, §§ 601-686, 52 Stat. 840 (1938) (repealed 1979). After the hard experience of the Great Depression, Congress passed the Chandler Act, which extensively amended the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979). Included in the Chandler Act was Chapter XIII, which authorized special proceedings in bankruptcy for wage earners and low-income debtors. The chapter sought to provide a method whereby wage earners could avoid bankruptcy and pay their debts in full or in part out of their future earnings pursuant to a court approved repayment plan. Once the plan was accepted by the debtor and a majority of the creditors and approved by the court, the debtor had to submit his earnings to the supervision of the court. *See* D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 11, 14 (1971).

The concept of allowing insolvent debtors with a regular income to repay their creditors by means of a court administered repayment plan was first developed by Special Bankruptcy Referee Valentine Nesbitt in the early 1930's. The provisions of Chapter XIII were in large part modeled on the procedures developed by Nesbitt. *See* Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, 49 AM. BANKR. L.J. 99, 115-16 (1975) (discussion of genesis of Chapter XIII).

[10] *See* D. STANLEY & M. GIRTH, *supra* note 9, at 74 (analysis of Chapter XIII usage).

[11] *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess. 12-13 (1973) (reasons for limited use of Chapter XIII) [hereinafter cited as H. R. Doc. No. 137], *reprinted in* 2 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, doc. 21 at 12-13 (1979). Chapter XIII limited eligibility to individuals whose "principal income was derived from wages, salary or commissions." Chandler Act § 606(8). This limitation obviously excluded from eligibility a number of individuals whose income was derived from other sources, but who were still be able to meet the obligations of a repayment plan. Furthermore, a Chapter XIII plan could not deal with any indebtedness secured by real property, and payments under the plan had to be made exclusively out of future income. Chandler Act §§ 606(1), 656. Finally, many lawyers and judges were apparently reluctant to encourage use of Chapter XIII because of the administrative problems involved. H.R. Doc. No. 137, *supra*, at 157-58, *reprinted in* 2 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, doc. 21 at 157-58 (1979).

[12] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified primarily in 11 U.S.C. and scattered sections of 28 U.S.C.), was intended substantially to overhaul the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979), in order to modernize and correct perceived inadequacies in the bankruptcy law. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 3-4 (setting forth purposes of Bankruptcy Reform Act of 1978) [hereinafter cited as 1978 H.R. REP.], *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5965.

[13] *See* 1978 H.R. REP., *supra* note 12, at 5 (proposed Chapter 13 encourages debtors to repay debts rather than to opt for liquidation), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5966; H.R. Doc. No. 137, *supra* note 11, at 159 (repayment plans should

this end, substantial debtor-oriented reforms were incorporated in the present Chapter 13.[14]

One of these reforms was the deletion of the Chandler Act's Chapter XIII provision requiring creditor approval of the debtor's repayment plan as a condition of the plan's confirmation.[15] This provision was replaced in Chapter 13 of the Bankruptcy Reform Act of 1978 by 11 U.S.C. section 1325(a), which does not require creditor approval and mandates court confirmation of the repayment plan if the court determines the enumerated requirements of the section have been met.[16] By eliminating the creditor veto power over the debtor's plan, this change removed an obvious practical barrier to the confirmation of plans proposing less-than-full repayment of claims.[17] In addition, no minimum

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be fostered), *reprinted in* 2 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, doc. 21 at 159 (1979). The drafters of Chapter 13 felt that the use of repayment plans would both increase payment to creditors in bankruptcy proceedings and avoid the stigma normally attached to bankruptcy for debtors. 1978 H.R. REP., *supra* at 118, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079. It should be noted that former Chapter XIII is commonly referred to by the roman numeral XIII, while present Chapter 13 is referred to by the Arabic numeral. *See, e.g., In re* Iacovani, 2 Bankr. 256, 264 (Bankr. D. Utah 1980).

[14] *See* 1978 H.R. REP., *supra* note 12, at 118-19, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079. Among these reforms was the liberalization of eligibility requirements, allowing many previously ineligible debtors access to repayment plan relief. *Id.*; *see supra* note 11. Several types of debts, including debts arising from tort or fraud judgments, not dischargeable in a Chapter 7 straight liquidation proceeding were made dischargeable upon the debtor's completion of the Chapter 13 plan. *Compare* 11 U.S.C. § 727 (Supp. III 1979) (debts dischargeable under Chapter 7) *with id.* § 1328 (debts discharged upon completion of Chapter 13 were made immediately eligible for a subsequent discharge of debts upon completion of the repayment plan, or before completion if certain requirements were met). *Id.* § 1328(a)(9); *see infra* note 38. By contrast, after receiving a Chapter 7 discharge, a debtor is ineligible for a subsequent discharge for a six year period. 11 U.S.C. § 1328(a)(8) (Supp. III 1979). *See generally* Lee, *Chapter 13 nee Chapter XIII*, 53 AM. BANKR. L.J. 303, 305-07 (1979) (discussion of reforms enacted in present Chapter 13).

[15] Under the Chandler Act §§ 651-652, the debtor's plan had to be approved by a majority of the creditors affected by the plan. In addition, this numerical majority had to represent a majority in terms of the amount of claims. *Id.* § 652.

[16] See *supra* note 7 for text of § 1325(a). This change reflected the opinion of the drafters of Chapter 13 that an independent determination of statutory compliance would be the best safeguard of creditors' interests. In addition, it appeared that creditors seldom exercised their veto power. *See* H.R. Doc. No. 137, *supra* note 11, at 162-63, *reprinted in* 2 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, doc. 21 at 162-63 (1979). Notwithstanding this change, creditors still retain the right to *object* to the plan at the confirmation hearing. 11 U.S.C. § 1324 (Supp. III 1979).

[17] *See* 1978 H.R. REP., *supra* note 12, at 123-24, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6084-85.

requirement for repayment of unsecured creditors[18] was included in the statutory requirements of section 1325(a) beyond that of section 1325(a)(4), which requires that unsecured creditors receive at least as much under the Chapter 13 plan as they would in a Chapter 7 liquidation.[19] Since in a majority of consumer bankruptcies unsecured creditors would receive little or nothing under a Chapter 7 liquidation,[20] many debtors under Chapter 13 were able to propose plans that were in technical compliance with section 1325(a), but would result in little or no repayment of unsecured creditors.[21] These de minimis repayment plans precipitated a massive judicial controversy[22] over whether the requirement of section 1325(a)(3) that a Chapter 13 plan must be proposed in good faith mandated a minimum amount to be repaid to unsecured creditors.[23]

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[18] Section 1325(a)(5) does provide, however, three alternative methods for dealing with the claims of *secured* creditors. *See supra* note 6. Furthermore, section 1322(a)(2) of Chapter 13 requires that the debtor's plan provide for full payment of priority claims unless the debtor and creditor agree otherwise.

[19] 11 U.S.C. § 1325(a)(4) (Supp. III 1979). See *supra* note 6 for the text of this provision. This provision is commonly referred to as the "best interest of creditors test." *See, e.g.*, Cleveland Trust Co. v. Keckler (*In re* Keckler), 3 Bankr. 155, 159 (Bankr. N.D. Ohio 1980).

[20] *See, e.g., The Bankruptcy Reform Act, Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 94th Cong., 1st Sess. 104 (1975) (Conrad K. Cyr stating that approximately 80% of consumer bankruptcies are no-asset cases), *reprinted in* 10 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, doc. 21 at 104; H.R. DOC. NO. 137, *supra* note 11, at 65 (typical debtor has few or no non-exempt assets), *reprinted in* 2 BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, doc. 21 at 65 (1979).

[21] *See, e.g., In re* Polak, 9 Bankr. 502, 504-06 (Bankr. W.D. Mich. 1980). *See generally* Hughes, *Chapter 13's Potential for Abuse*, 58 N.C.L. REV. 831, 832-35 (1980) (discussion of factors allowing for filing of low payment plans). For purposes of this note, plans proposing no payment of unsecured creditors will be denominated "zero payment" plans and those proposing only nominal payment will be termed "de minimis" plans.

[22] The court in *In re* Heard, 6 Bankr. 876, 878 (Bankr. W.D. Ky. 1980), noted that as of November 1980 over 100,000 words in 49 published opinions from 27 federal district courts had been devoted to the meaning of good faith in § 1325(a)(3). The *Heard* court termed these varying opinions a "judicial stampede in search of the meaning of good faith." 6 Bankr. at 878. One judge noted that "no single problem has attracted as much attention under the Code." Hughes, *supra* note 21, at 849.

[23] *See, e.g., In re* Blossfeld, 13 Bankr. 534, 536-37 (Bankr. N.D. Ill. 1981); *In re* Stollenwerck, 5 Bankr. 616, 617-18 (Bankr. M.D. Ala. 1980); *see infra* notes 33-35, 42-48 and accompanying text. "Good faith" is not specifically defined in Chapter 13 or in the Bankruptcy Code as a whole. Chapter XIII of the Chandler Act contained a good faith provision virtually identical to § 1325(a)(3). *Compare* Chandler Act § 656(a)(4) (plan and its acceptance are in good faith) *with* 11 U.S.C. § 1325(a)(3) (plan proposed in good faith). As to the good faith provision in Chapter XIII, the editors of COLLIER, in a previ-

The first reported case to consider whether a de minimis plan violated the good faith requirement was *In re Curtis*,[24] in which the court confirmed a plan proposing a ten percent repayment of unsecured creditors.[25] The *Curtis* court placed primary emphasis in determining good faith on whether the plan represented the debtor's "best effort" to repay his debts.[26] The court then adopted a rule of thumb that a proposal to pay ten percent of the debtor's take-home pay for a three year term demonstrated good faith.[27] The court noted, however, that because section 1325(a)(4) sets forth a minimum repayment standard, it was doubtful that an "immutable" higher minimum repayment standard could be read into section 1325(a)(3) for purposes of determining

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ous edition, have stated the following: "Good faith itself is not defined but generally the inquiry is directed to whether or not there has been an abuse of the provisions, purpose, or spirit of Chapter XIII in the proposal or plan." 10 COLLIER ON BANKRUPTCY ¶ 29.06(6) (14th ed. 1978). *See infra* note 49 and accompanying text.

Congress has attempted to amend § 1325(a)(3) to resolve the controversy over its interpretation. The Senate version of a Technical Amendments Bill to the Bankruptcy Reform Act of 1978 proposed to add to § 1325(a)(3) a requirement that the plan represent the debtor's "best effort." *See* S. 658, 96th Cong., 1st Sess. § 188, 125 CONG. REC. S12,178 (daily ed. Sept. 7, 1979). The House substituted a "good faith effort" requirement for the "best effort" language. *See* H.R. 779, 96th Cong., 2d Sess. § 128(b), 126 CONG. REC. H9299 (daily ed. Sept. 22, 1980). The bill was returned to the Senate, which deleted the amendment to § 1325(a)(3) and proposed to add to § 1325(a)(4) a "bona fide effort" requirement. *See* S. 658, 96th Cong., 2d Sess. § 128(b), 126 CONG. REC. S15,170 (daily ed. Dec. 1, 1980). This version was sent back to the House, which passed it with the Senate proposals intact. *See* H.R. 779, 96th Cong., 2d Sess. § 127(b), 126 CONG. REC. H11,735 (daily ed. Dec. 3, 1980). The bill ultimately foundered on other disputes and was not enacted. The bill was reintroduced as the Bankruptcy Amendments Act of 1981 with the "bona fide effort" amendment to § 1325(a)(4) in place. *See* S. 863, 97th Cong., 1st Sess. § 128(b), 127 CONG. REC. S3357 (daily ed. April 2, 1981). In July of 1981 the Amendments Act was reported favorably out of the Senate Judiciary Committee, S. REP. No. 150, 97th Cong., 1st Sess. 1 (1981), but it has yet to be passed by the House.

[24] 2 Bankr. 43 (Bankr. W.D. Mo. 1979).

[25] *Id.* at 44-45.

[26] *Id.* at 45; *accord In re* Marlow, 3 Bankr. 305, 308 (Bankr. M.D. Tenn. 1980) (best effort of paramount importance in good faith determination); *cf. In re* Bellgraph, 4 Bankr. 421, 424 (Bankr. W.D.N.Y. 1980) (zero payment plan confirmed because represented "super effort" by debtor). *Contra In re* Wiggles, 7 Bankr. 373, 375 (Bankr. N.D. Ga. 1980) (best effort not intended to be requirement for good faith). *See infra* note 38 and accompanying text.

[27] 2 Bankr. at 45. The *Curtis* rule of thumb has apparently not been adopted by any other court, although one commentator has noted that many courts seem to have adhered to it in practice. *See* Lopucki, *"Encouraging" Repayment under Chapter 13 of the Bankruptcy Code*, 18 HARV. J. ON LEGIS. 347, 360 (1981) (discussing courts' reactions to de minimis repayment plans).

good faith.[28] Therefore, the court concluded that exceptional circumstances of the debtor would justify a departure from the ten percent repayment rule of thumb.[29] The *Curtis* court's emphasis on best effort has been echoed in varying degree by a number of later decisions considering de minimis or zero payment plans.[30]

In *In re Iacovani*,[31] the Bankruptcy Court of Utah developed a substantially different theory of good faith determination in denying confirmation of eight unrelated zero payment plans.[32] The *Iacovani* court found in the legislative history of Chapter 13 a clear congressional intent to require "substantial" or "meaningful" repayment of unsecured creditors as a condition of good faith.[33] The ability to make

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[28] 2 Bankr. at 45 & n.6.

[29] *Id.* at 44-45; *accord In re* Bellgraph, 4 Bankr. 421, 423 (Bankr. W.D.N.Y. 1980) (exceptional circumstances justify confirmation of zero plan). The court found "exceptional circumstances" in the *Curtis* case because the debtor was paying at the limit of his ability and was expecting the imminent arrival of another child, resulting in the loss of his wife's income. Therefore, the proposed payments in *Curtis*, representing less than 10% of the debtor's take-home pay and running for an 18 month term, were approved. *Id.* at 45.

[30] *See, e.g.*, Georgia R.R. Bank & Trust Co. v. Kull (*In re* Kull), 12 Bankr. 654, 660 (Bankr. S.D. Ga. 1981) (best effort is one factor to be considered in good faith determination); Thompson Supply Co. v. Roy (*In re* Roy), 5 Bankr. 611, 613 (Bankr. M.D. Ala. 1980) (zero payment plan confirmed primarily because it represented debtor's best effort); *In re* Marlow, 3 Bankr. 305, 308 (Bankr. M.D. Tenn. 1980) (best effort of paramount importance); *cf. In re* Bellgraph, 4 Bankr. 421, 422 (Bankr. W.D.N.Y. 1980) (sincere, meaningful, honest effort required).

[31] 2 Bankr. 256 (Bankr. D. Utah 1980).

[32] *Id.* at 267-68. *Iacovani* was a consolidation of eight cases, all of which included plans proposing no payment to unsecured creditors. *Id.* at 258.

[33] *Id.* at 267. Essentially, the court inferred from language in the H.R. Doc. No. 137, *see supra* note 11, stating that the Bankruptcy Reform Act should not require non-exempt assets to be applied to payment of debts unless required to meet the standards of §1325 (a)(4) and good faith, that "good faith" was intended to contain a substantive standard of payment separate from 1325(a)(4). 2 Bankr. at 266. The court noted that 1978 H.R. REP., *see supra* note 12, criticized Chapter XIII as discouraging debtors from attempting to repay "most, if not all" of their debts by means of a repayment plan. From this language the court inferred that in revising Chapter XIII, Congress intended to produce a means by which debtors would repay "most, if not all" of their debts. 2 Bankr. at 266. Finally, the court inferred from language in H.R. REP. No. 595 indicating that Chapter 13 required that unsecured creditors receive *more* than they would in a liquidation, that § 1325(a)(3) was intended to supplement § 1325(a)(4) in effecting substantial repayment of these creditors. 2 Bankr. at 266. Numerous courts have made a similar analysis of the legislative history of Chapter 13. *See, e.g.*, Deans v. O'Donnell, 14 Bankr. 997, 999 (E.D. Va. 1981) (legislative history indicates intent of substantial repayment as requirement for good faith); *In re* Burrell, 6 Bankr. 360, 365 (N.D. Cal. 1980) (same); *In re* Hurdle, 11 Bankr. 304, 306 (Bankr. E.D. Va. 1981) (same); *cf. In re* Beaver, 2 Bankr. 337, 339 (Bankr. S.D. Cal. 1980) (creditors' losses intended to be "significantly reduced" in

meaningful repayment was in turn considered to be a condition of eligibility for Chapter 13 relief.[34] The court stated that what constitutes "meaningful" repayment must be determined equitably under the circumstances of the particular case.[35] It then listed four elements to be considered in making this determination:[36] (1) the amount the debtor could feasibly pay; (2) the debtor's future payment prospects; (3) the amount of debts and proposed percentage of repayment; and (4) the types of debts to be discharged.[37] In addition, the *Iacovani* court found that best effort is not a requirement for confirmation of a repayment plan, though it is one element to be considered.[38] *Iacovani* is the lead-

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Chapter 13). *But see In re* Celeste, 9 Bankr. 392, 394 (Bankr. N.D. Ohio 1981) (no legislative intent to make substantial repayment a requirement for good faith); *In re* Wiggles, 7 Bankr. 373, 375 (Bankr. N.D. Ga. 1980) (same).

[34] 2 Bankr. at 268.

[35] *Id.* at 267. The court stressed the inherent equitable power of bankruptcy courts to ensure that all parties are treated fairly in a particular case. *Id.* at 268; *see infra* note 60.

[36] 2 Bankr. at 267. These elements as they appeared in the opinion were:

1. The budget of the debtor, i.e. how much the debtor feasibly can pay.
2. The future income and payment prospects of the debtor.
3. The dollar amount of debts outstanding, and the proposed percentage of repayment.
4. The nature of the debts sought to be discharged; specifically, to what extent the debtor is invoking the advantage of the broader Chapter 13 discharge which may carry with it concomitant obligations of repayment effort.

Id.

[37] *Id.* One of the major points of contention within the good faith controversy has been whether the fact the debtor elected to discharge otherwise nondischargeable debts under his plan affected the good faith determination. The *Iacovani* court suggested that utilizing the liberal discharge provisions of Chapter 13 may call for a *quid pro quo* of greater repayment. *See supra* note 26. A number of courts have held the types of unsecured debts to be discharged affected the amount of payment required for a finding of good faith. *See, e.g.*, American Family Ins. Group v. Barker (*In re* Barker), 7 Bankr. 707, 710 (Bankr. W.D. Mo. 1980) (debtor must give "special recognition" to nondischargeable debt); *In re* Cook, 3 Bankr. 480, 486 (Bankr. S.D.W. Va. 1980) (good faith requires that higher percentage be paid on nondischargeable debts). *But see In re* Thorson, 6 Bankr. 678, 682 (Bankr. D.S.D. 1980) (fact that debt is nondischargeable requires no greater payment); *In re* Jenkins, 4 Bankr. 278, 280-81 (Bankr. D. Colo. 1980) (fact the nondischargeable debt is to be discharged has no effect on confirmation of plan).

[38] 2 Bankr. at 267. This finding was based on the language of 11 U.S.C. § 727(a) (Supp. III 1979), which governs the availability of subsequent discharges in bankruptcy. *See* 2 Bankr. at 267. Section 727(a)(9)(B) provides that a debtor granted a discharge under Chapter 13 is not eligible for another discharge for six years, unless the debtor's plan has repaid at least 70% of unsecured claims and was both proposed in good faith and represented the debtor's best effort. The *Iacovani* court reasoned that since both good faith and best effort were included in § 727(a)(9)(B), good faith and best effort were

ing case in a line of authority that has found in section 1325(a)(3) a substantive requirement of substantial or meaningful repayment of unsecured creditors.[39]

The divergent positions taken in the good faith controversy became clearer in the months following *Iacovani* when a number of courts were faced with Chapter 13 de minimis or zero payment plans. The Bankruptcy Court for the Eastern District of Arkansas, in *In re Sadler*,[40] strictly interpreted the terms of section 1325(a) in confirming a zero payment plan.[41] The *Sadler* court found no indication that the good faith requirement was intended to include a repayment standard.[42] Since Congress did not include a minimum payment requirement in Chapter 13 other than the minimum repayment standard of section 1325(a)(4), the court stated that to read a higher requirement into section 1325(a)(3) would be a judicial usurpation of a legislative function.[43]

The strict interpretation of section 1325(a) implicit in *Sadler* was more fully developed in *In re Cloutier*,[44] in which the Bankruptcy Court of Colorado confirmed a zero payment plan.[45] The *Cloutier* court

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separate and distinct elements. 2 Bankr. at 267. A number of courts have used a similar analysis and have held that best effort is not a requirement for good faith. *See, e.g., In re* Dant, 9 Bankr. 117, 121 (Bankr. E.D. Va. 1981); *In re* Burrell, 6 Bankr. 360, 365-66 (N.D. Cal. 1980); *In re* Harland, 3 Bankr. 597, 598-99 (Bankr. D. Neb. 1980).

[39] *See, e.g., In re* Johnson, 5 Bankr. 40, 42 (Bankr. S.D. Ohio 1980) (referring to *Iacovani* analysis of legislative history to find substantive requirement); *In re* Hurd, 4 Bankr. 551, 558 (Bankr. W.D. Mich. 1980) (*Iacovani* was first case to require meaningful repayment). The majority of courts have agreed with *Iacovani* that substantial repayment is a condition of good faith. *See* Kelley, *Good Faith and Chapter 13*, 36 PERS. FIN. L.Q. REP. 8, 9 (1982) (majority of courts require substantial repayment for finding of good faith).

[40] 3 Bankr. 536 (Bankr. E.D. Ark. 1980).

[41] *Id.* at 536-37. *Sadler* was decided by Bankruptcy Judge Charles W. Baker of Arkansas. *Id.* at 536. The strict interpretation of § 1325(a) applied in *Sadler* was first set forth, though not fully articulated, in Tenney v. Terry (*In re* Terry), 3 Bankr. 63 (Bankr. W.D. Ark.), *rev'd*, 630 F.2d 634 (8th Cir. 1980). *See infra* notes 50-55 and accompanying text.

[42] 3 Bankr. at 536-37.

[43] *Id.* at 537; *accord* Lewiston Seaport Plumbing & Heating, Inc. v. Prine (*In re* Prine), 10 Bankr. 87, 89 (Bankr. D. Idaho 1981) (reading payment standard into good faith requirement is unauthorized judicial legislation); *cf.* Beneficial Finance Co. v. McBride (*In re* McBride), 4 Bankr. 389, 392 (Bankr. M.D. Ala. 1980) (it is not court's prerogative to add confirmation requirements in interpreting good faith provision).

[44] 3 Bankr. 584 (Bankr. D. Colo. 1980).

[45] *Id.* at 585. Concerning the debtor's plan, the *Cloutier* opinion noted only that it proposed no payment to unsecured creditors and that an unsecured creditor raised the good faith objection. *Id.*

expressly rejected the *Iacovani* analysis of the legislative history of Chapter 13,[46] and stated that the legislative history contained no indication that the good faith requirement was intended to mandate any payment to unsecured creditors.[47] Also, the court reasoned that since section 1325(a)(4) explicitly sets forth a minimum repayment standard, a court may not resort to legislative history to change the plain meaning of the section.[48] The *Cloutier* court viewed good faith as lacking only when the debtor's plan amounted to an "abuse of the provisions, purposes, or spirit" of Chapter 13.[49]

The first United States Court of Appeals to address the good faith issue was the Eighth Circuit in *Tenney v. Terry* (In re *Terry*).[50] *Terry*

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[46] *Id.* at 585, 587.

[47] *Id.* at 585-86; *accord In re* Celeste, 9 Bankr. 392, 393-94 (Bankr. N.D. Ohio 1981) (payment standard not intended in term good faith); *In re* Wiggles, 7 Bankr. 373, 375-76 (Bankr. N.D. Ga. 1980) (same); *In re* Harland, 3 Bankr. 597, 599 (Bankr. D. Neb. 1980) (nothing in legislative history indicates good faith is tied to repayment schedule); *see also* Cyr, *The Chapter 13 "Good Faith" Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 275-77 (1981) (discussion of history and intent of good faith requirement).

[48] 3 Bankr. at 585. The *Cloutier* court's rationale appears to be in accord with other decisions concerning the use of legislative history to change the plain meaning of a statute. *See* TVA v. Hill, 437 U.S. 153, 156 (1978) (court may not resort to legislative history to change the plain meaning of a statute). The *Cloutier* court agreed with the *Iacovani* court that the language and history of Chapter 13 indicated that "payments" were to be made by the debtor. But the *Cloutier* court found no reason to believe that this meant payment to unsecured creditors in particular. *Id.* at 585-86.

[49] 3 Bankr. at 587. The court adopted this language from 5 COLLIER ON BANKRUPTCY ¶ 29.06(6) (14th ed. 1978). See *supra* note 23 for a discussion of COLLIER's good faith inquiry. A number of courts have used the COLLIER description of the good faith inquiry as a guideline in interpreting § 1325(a)(3). *See, e.g., In re* Montano, 4 Bankr. 535, 538 (Bankr. D.C. 1980), *modified sub nom. In re* Barnes, 13 Bankr. 997 (Bankr. D.C. 1981); *In re* McMinn, 4 Bankr. 150, 152 (Bankr. D. Kan. 1980); *In re* Keckler, 3 Bankr. 155, 158 (Bankr. N.D. Ohio 1980).

Other courts have promulgated varying definitons to guide the good faith inquiry. *See, e.g., In re* Kull, 12 Bankr. 654, 659 (Bankr. S.D. Ga. 1981) (real test of good faith is whether debtor proposes to pay amount sufficient to show commitment to spirit of Chapter 13); *In re* Harper, 11 Bankr. 395, 396 (Bankr. M.D. Ga. 1981) (good faith is honesty of purpose and full disclosure of finances); *In re* Beaver, 2 Bankr. 337, 339 (Bankr. S.D. Cal. 1980) (good faith is fundamental fairness in dealing with creditors).

[50] 630 F.2d 634 (8th Cir. 1980). The Bankruptcy Reform Act of 1978 established a system of appeals from the bankruptcy courts as follows: (1) The first level of appeal from a bankruptcy court decision is to a three judge bankruptcy appellate panel. 28 U.S.C. § 160 (Supp. III 1979). If an appellate panel has not been provided, the appeal is to the appropriate district court. *Id.* § 1334(a). (2) Decisions of appellate panels or district courts are to be appealed to the appropriate circuit court. *Id.* § 1293. An appeal from a bankruptcy court may, however, be made directly to the circuit court of appeals by agreement of the parties. *Id.* § 1293(b). (3) Appeals from circuit courts are made to

was an appeal from a bankruptcy court decision confirming a zero payment plan when all the claims were unsecured and the debtor had no non-exempt assets.[51] The Eighth Circuit reversed in a per curiam opinion,[52] basing its decision in part on a finding that the plan was not proposed in good faith.[53] The court stated that the spirit of Chapter 13 contemplated that some payments would be made and cited *Iacovani* in support of the contention that a plan proposing no payments at all was an abuse of this spirit and of the liberal discharge provisions of Chapter 13.[54] The court acknowledged that the lack of specific statutory guidance would create some problems in fixing the amount of payment to be required, but did not indicate how these problems might be resolved.[55]

Two years after *Terry*, the Seventh Circuit considered the good faith of a de minimis plan in *Ravenot v. Rimgale (In re Rimgale)*.[56] In *Rimgale* the district court, without reaching the good faith issue, reversed a bankruptcy court order confirming a plan proposing an eleven percent repayment of unsecured creditors.[57] On appeal, the Seventh

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the United States Supreme Court by statutory writ of certiorari. *Id.* § 1254 (Supp. II 1978). *Terry* was appealed directly to the Eighth Circuit from the bankruptcy court by agreement of the parties. 630 F.2d at 635.

[51] 630 F.2d at 634. Since there were no secured or priority creditors and since unsecured creditors would have received nothing from a liquidation, the debtor proposed a plan consisting of no payments of any sort. *Id.* In the bankruptcy court opinion in *Terry*, Judge Charles W. Baker found that § 1325(a)(3) did not require any minimum payment of unsecured creditors. Tenney v. Terry (*In re* Terry), 3 Bankr. 63, 66 (Bankr. W.D. Ark.), *rev'd*, 630 F.2d 634 (8th Cir. 1980). In reply to the bankruptcy trustee's objection that the plan was not proposed in good faith since an adequate remedy was available under Chapter 7, Judge Baker stated the debtor's choice to opt for Chapter 13 without exercising the "right" to make payments did not show a lack of good faith. 3 Bankr. at 66. See *supra* note 41 for further conmments concerning the *Tenney* decision.

[52] 630 F.2d at 634.

[53] *Id.* at 635. The other ground for reversal was that the debtor was ineligible for Chapter 13 relief because he did not have sufficient income to make payments. *Id.*

[54] *Id.*

[55] *Id.* There is no indication in the *Terry* opinion whether a de minimis repayment plan or a plan proposing payments only to secured and priority creditors would be acceptable. At least one court has narrowly interpreted *Terry* as applying only to plans proposing no payments of any sort. *See In re* Hildremyr, 8 Bankr. 676, 678 (Bankr. D.S.D. 1981) (distinguishing case from *Terry* because payments made to secured and priority creditors).

[56] 669 F.2d 426 (7th Cir. 1982).

[57] *Id.* at 427, 430. Most of the unsecured debt involved in *Rimgale* was the result of a tort judgment against the debtors in favor of Mary Ravenot. *Id.* at 429. The bankruptcy court rejected two plans proposing no payment to Mrs. Ravenot before confirming a third plan proposing payment of 11% of her claim. *Id.* Mrs. Ravenot appealed the

Circuit vacated the district court judgment and, in part because the district court had not inquired into the good faith of the payment plan, remanded the case.[58] The circuit court cautioned that the good faith requirement could not be treated as a license to graft additional confirmation requirements onto section 1325(a), but rejected the debtor's argument that as long as the standard of section 1325(a)(4) was met the amount of payment was not a consideration in the confirmation decision.[59]

The circuit court in *Rimgale* noted its approach to the good faith problem was made in light of the "broad equitable principles" of American bankruptcy law.[60] It then stated that through interpretation of section 1325(a)(3) the courts could exercise their power to prevent abuse of Chapter 13 and, at the same time, effectuate the congressional intent of substantial repayment of unsecured creditors.[61] Futhermore, the court found that substantiality of payment and effort on the part of the debtor should be considered in the good faith determination.[62] Within these guidelines, the court concluded the debtor's entire cir-

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confirmation of the plan on three grounds: (1) that the plan did not satisfy the minimum payment requirement of § 1325(a)(4); (2) that the plan was not proposed in good faith; and (3) that the bankruptcy court had unduly restricted her arguments against the plan. *Id.* at 430. The district court reversed on the first ground without considering the good faith objection. *Id.*

[58] *Id.* at 427, 433. The other ground for vacating was the district court's erroneous reading of § 1325 (a)(4) that a normally nondischargeable debt had a greater value under that section than a dischargeable one. *Id.* at 430.

[59] *Id.* at 431. The court noted that because Congress did not set any minimum payment level as a condition of eligibilty for Chapter 13 relief, the courts could not read such a requirement into § 1325(a)(3). *Id.*

[60] *Id.* at 429; *see, e.g.*, Ling & Co. v. Carpenter (*In re* Westec Corp.), 449 F.2d 243, 244 (5th Cir. 1971) (bankruptcy courts are invested with broad equitable powers and discretion); *cf.* Johnson v. Seely (*In re* Seely), 6 Bankr. 309, 313 (Bankr. E.D. Va. 1980) (bankruptcy court has inherent power to require clean hands or good faith). *But cf.* Samfel, Inc. v. Roemelmeyer (*In re* Dade County Dairies, Inc.), 474 F. Supp. 438, 440 (S.D. Fla. 1979) (equitable powers of bankruptcy court are limited and must not be exercised inconsistently with Bankruptcy Act).

[61] 669 F.2d at 432. The court at this point adopted the analysis of the district court opinion in *In re* Burrell, 6 Bankr. 360 (N.D. Cal. 1980). *Id.* In *Burrell* the District Court for the Northern District of California, sitting in its bankruptcy appellate function, reversed the decision of a bankruptcy court that had held that good faith mandated 70% repayment of unsecured creditors. 6 Bankr. 366. The district court applied the *Iacovani* analysis in determining the good faith requirement was intended to ensure substantial repayment of unsecured creditors. *Id.* at 363-65. The court, however, declared that to set a rigid standard of 70% repayment would render § 1325(a)(4) superfluous, and proper statutory construction would not permit such a result. *Id.* at 365-66.

[62] 669 F. 2d at 432.

cumstances should be considered in order to determine if the plan proposed "meaningful" repayment of unsecured creditors.[63]

In the instant case, the court reasoned that since Congress had set an explicit minimum payment standard in section 1325(a)(4)[64] and was currently considering legislation to clarify the meaning of good faith in section 1325(a)(3),[65] and since it was uncertain whether a substantial repayment requirement would advance the purposes of the Bankruptcy Code,[66] section 1325(a)(3) should not be interpreted to impose such a requirement.[67] Rather, the court reasoned that since a bankruptcy court is by nature a court of equity[68] and since Congress had not specifically defined good faith,[69] the proper inquiry in determining good faith is whether the debtor has acted equitably in proposing the repayment plan, considering not only substantiality of payment but also all relevant circumstances of the case.[70] The court concluded that since the bankruptcy court did not properly inquire into all the relevant circumstances of the debtor in determining good faith, the case must be

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[63] *Id.*

[64] 675 F.2d at 1388. "The presence of an explicit statutory standard (which the plaintiffs met) strongly suggests that Congress did not intend to substitute a more rigorous standard when it imposed a general good faith requirement." *Id.*

[65] *Id.* at 1389. The court found the proposed "bona fide effort" requirement contained in the Bankruptcy Amendments Act of 1981, *see supra* note 23, to be significant in two respects. First, it showed a congressional awareness of the good faith controversy, and, second, it demonstrated that a substantial repayment requirement was not necessary to resolve the controversy. 675 F.2d at 1389. See *supra* note 23 for a discussion of the Bankruptcy Amendments Act of 1981.

[66] 675 F.2d at 1389. The court did not elaborate on this ground of the decision.

[67] *Id.* The court thought it best to "apply the law as written and wait for Congress to create, if it chooses, further conditions for the confirmation of Chapter 13 plans." *Id.*

[68] *Id.* at 1390. The court cited American United Mut. Ins. Co. v. City of Avon Park, 311 U.S. 138 (1940), in support of this proposition. The court noted that in that case, the United States Supreme Court emphasized the equitable nature of bankruptcy courts in interpreting a good faith provision contained in the Bankruptcy Act of 1898. 675 F.2d at 1390. See *supra* note 60 for a discussion of the equitable nature of bankruptcy courts.

[69] 675 F.2d at 1390.

[70] *Id.* Misrepresentation of facts in the debtor's plan and unfair manipulation of the provisions of the Bankruptcy Code were presented as examples of inequitable conduct. The court then noted that the plaintiff's plan was not an attempt to evade their debts and that the plan left them no surplus income. The court held that these factors indicated the plan was in fact proposed in good faith. In conclusion, the court cautioned that its opinion was not an endorsement of de minimis plans and that nominal payment was a factor tending to indicate bad faith. *Id.* at 1390-91. The court recognized the statutory problems arising from zero payment plans, but specifically reserved judgment on their legality. *Id.* at 1389 n.5.

remanded for determination consistent with its opinion.[71]

The instant court appears to have offered a well founded and cogent approach to determining the good faith of de minimis plans. It correctly recognized that since an explicit minimum standard for repayment of unsecured creditors was set in section 1325(a)(4), it is not a judicial prerogative to add what amounts to a second, higher standard in interpreting the good faith requirement of section 1325(a)(3).[72] The *Iacovani* analysis, by contrast, appears to strain the limits of statutory interpretation[73] by discounting the plain language of section 1325(a)(4) in favor of inferences of an unarticulated congressional intent to require substantial repayment.[74] The instant court's analysis assigns a proper role to amount of payment by making it a consideration in the good faith determination, not in itself determinative, but to be considered in the context of all other relevant circumstances.[75]

By making substantiality of payment a nondeterminative consideration rather than a determinative requirement, the instant court's approach avoids the *Iacovani* pitfall of effectively vitiating the minimum repayment language of section 1325(a)(4).[76] At the same time, under this approach the courts retain the discretion to prevent abuse of Chapter 13 by considering substantiality of payment in combination with other circumstances, none of which alone would violate section 1325(a)(3), but which in the aggregate would amount to a lack of good faith. This inherent flexibility gives the instant court's analysis the potential to produce at least a partial quieting of the good faith controversy.

The analysis of the instant court and the *Rimgale* court of the good faith inquiry are in essential respects identical,[77] differing only in the *Rimgale* court's acceptance of the idea of a congressional intent of substantial repayment of unsecured creditors.[78] The *Rimgale* decision does not, however, specifically require substantial repayment; there-

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[71] *Id.* at 1390; *see supra* note 8.

[72] *See supra* notes 65, 68 and accompanying text.

[73] *See supra* notes 43, 48.

[74] *See supra* note 33 and accompanying text. In addition, it would appear that if Congress had intended § 1325(a)(3) to contain a substantial repayment requirement, then somewhere in Chapter 13 or in the voluminous materials leading up to its enactment this fact would have been unambigously stated.

[75] *See supra* notes 70-71 and accompanying text.

[76] *See supra* notes 18-29, 43, 48, 65 and accompanying text.

[77] *See supra* notes 61-64 and accompanying text. *Rimgale* and *Goeb* agree that the good faith inquiry is an equitable one, and that substantiality of payment should be considered as a factor in the inquiry. *See supra* text accompanying notes 59-62, 65-71.

[78] *See supra* note 61 and text accompanying note 62.

fore, it is perhaps most accurate to say that the Seventh and Ninth Circuits are, with minor discrepancies, in agreement on the good faith question. That the two circuit court's analysis of section 1325(a)(3) are capable of consistent construction prevents a further escalation of the good faith controversy[79] and should, in fact, have the effect of facilitating resolution of the controversy.

In addition to the precedential value of the instant case in the Ninth Circuit, the advantages of its analysis—reservation of judicial discretion to prevent abuse of Chapter 13 and fidelity to the language of section 1325(a)—should lend it considerable persuasive weight in other jurisdictions. If its analysis finds widespread acceptance, as seems likely, the result should be the beneficial resolution of the good faith problem.

Robert B. Wiygul

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[79] The decision of the Eighth Circuit in *In re* Terry does not appear to be comparable with the instant decision. The *Terry* decision touched only on the good faith of a plan proposing no payments at all and did not address the question of whether a de minimis plan can be in good faith. The instant decision, on the other hand, dealt with a de minimis plan and specifically reserved judgment on the legality of zero payment plans. *See supra* notes 51-55 and accompanying text and note 71.

BOOK REVIEW

THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW

By: Edmund Cahn
Bloomington, Indiana: Indiana University Press, 1981
Pp. 315 $17.50

*L. Keith Parsons**

The Moral Decision was originally published in 1955. At that time, the work was generally well received and was reviewed extensively. In 1981, *The Moral Decision* was republished, inviting a new generation of judges, lawyers, and ethicists to think through the relationship between the law and morality with its author, Edmund Cahn.

Numerous works have been written dealing with the relationship between law and morality. Most of these works have dealt with the topic from the abstract perspective of the academic philosopher. What makes Cahn's book unique and, perhaps, the best treatise on the subject for the layman, is the concrete and pragmatic method that he adopts in approaching the subject. In this respect, Cahn's book can be considered both phenomenological and existential: phenomenological, in that it looks to the phenomenon itself, rather than starting with certain preconceived notions and attempting to deduce from them philosophical truths; and, existential, in that it deals with human beings in concrete, flesh and blood situations, rather than playing intellectual chess-games with legal and moral pawns. Cahn's technique is to take actual cases and draw from them insights into the nature of law and morality, providing pragmatic guide-

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posts for both judges and attorneys who must deal with similar problems and increasing the legal community's awareness of the moral nature of their enterprise.

But why should the practicing attorney, busy with motions and mergers, or the judge, inundated with a heavy case load, take the time to think through the law's relation to morality? I think that once the function served by law and morality in human experience and the pervasive nature of each is clearly understood, there will be no question whether the exercise is worth undertaking. Actually, it will be seen as a moral necessity.

Law is a human enterprise. The law has no intrinsic value, but becomes of great instrumental value when it serves its purpose, which is to aid human beings in achieving certain valuable ends. Thus, whether the law is regulating conduct to protect the individual, creating a system of rules that allow the accomplishment of certain economic ends, or attempting to expand and preserve the freedom of the individual to reach his own potential, the underlying purpose is the same—the achievement of valuable human ends.

How is value to be determined? When the means necessary to achieve certain ends conflict with each other, how are values to be ranked? And when everyone agrees in principle as to what is valuable, what concrete decisions will lead to obtaining those ends? These are the questions with which the moral philosopher struggles. Concisely put, morality is the discipline that asks: "What is valuable?" And having answered that, "What actions will lead to the achievement of these goals?" It is clear that the questions with which the moral philosopher deals and the questions faced by jurists overlap to a great extent.

From a historical point of view, the role played by the law in aiding individuals to answer moral questions has increased dramatically, in the last few centuries, as a result of the secularization of society following the breakdown of the medieval synthesis. At one point in western civilization the church provided almost exclusive guidance in the realm of morality. Increasingly, it has become the function of the law to provide the answers to similar questions. Whether for better or for worse, the judge and the attorney have been called upon in modern times to fill the role once occupied by the hierarchical church. To meet this re-

sponsibility, judges and attorneys must first realize that they are actually involved in a moral enterprise and second, give their best efforts to thinking through the moral problems raised by the cases before them.

This is the point at which Cahn's book provides an invaluable aid, not so much for the answers he provides, but rather for the questions he raises. Cahn demonstrates that the influence of the law upon our moral life extends from birth to the grave, from the mundane to the magnificent. At the same time, Cahn's illustrations show that the relationship between law and morality is one of reciprocal causation, with our moral notions influencing the evolution of the law.

Each member of the bar would benefit by exploring the moral nature of our profession with Edmund Cahn. Thus, I highly recommend *The Moral Decision*. Reading it will benefit members of the legal community by increasing their awareness of the moral significance of their work, and benefit the society they serve by causing them to approach their work with a strengthened sense of moral purpose.

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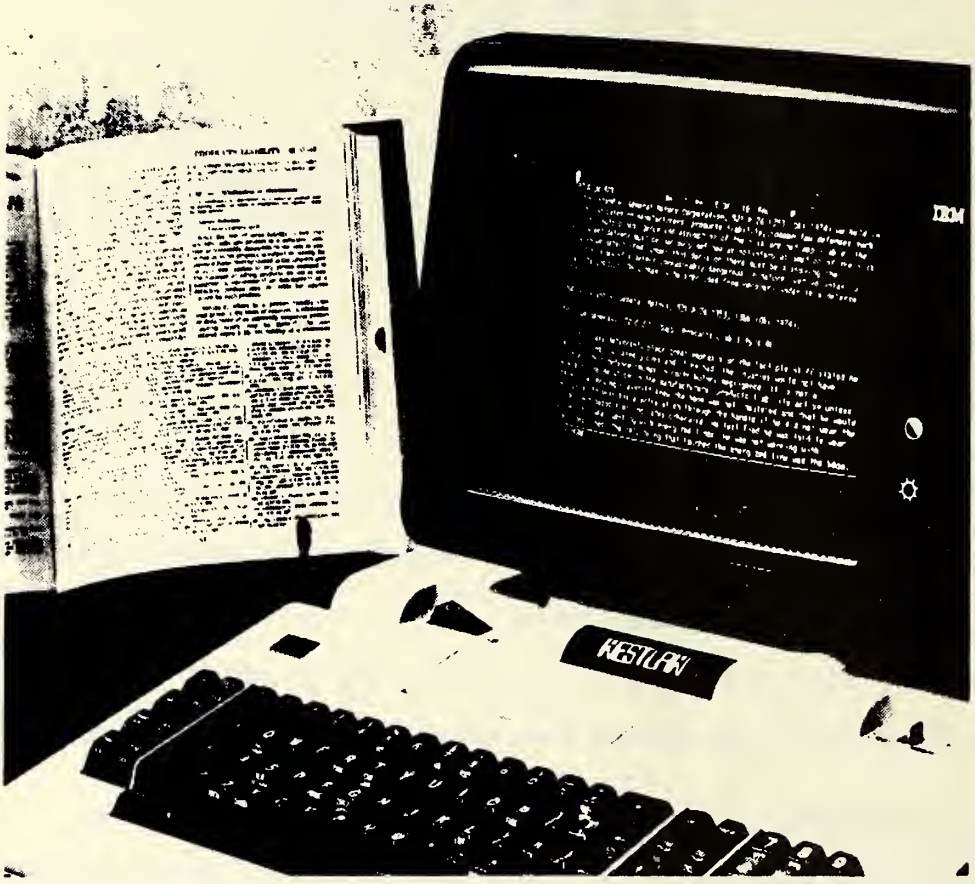

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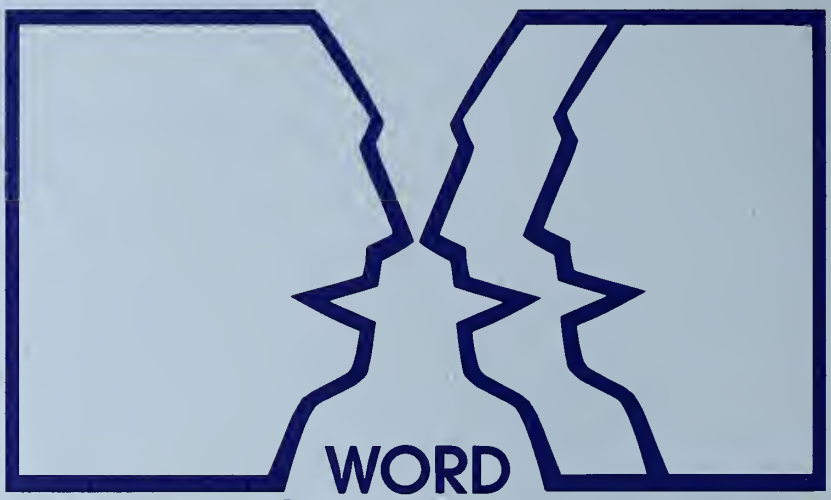

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